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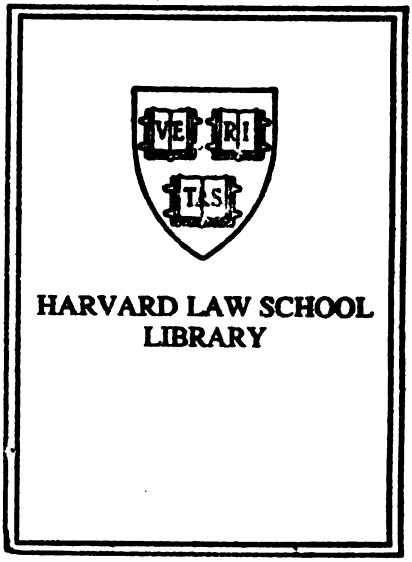

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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

MAY 26 TO SEPTEMBER 9, 1908

HERSCHEL BOUTON LAZELL
STATE REPORTER

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CIRCUIT COURT RULE 59.

In pursuance of section 313 of the Compiled Laws of 1897, it is ordered that in case of the disqualification of any circuit judge, or sickness of himself or family, or for any other cause on account of which he may be unable to hold court, he may call any other circuit judge, whose own official duties will permit, to hold court for him.

Adopted December 21, 1908.

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APRIL TERM, 1908.*

CHANDLER *v.* HEISLER.

1. CONSTITUTIONAL LAW — LEGISLATIVE POWERS — DELEGATION — BOARDS OF SUPERVISORS—DRAINS.

   Act No. 21, Pub. Acts 1905, conferring power upon the boards of supervisors of certain counties to add to the conditions to be complied with as prerequisites to the construction and repair of drains, is not an unconstitutional delegation of legislative power to boards of supervisors, but is a valid delegation of control over a local matter authorized by section 36, article 4, of the Constitution.

2. DRAINS—ESTABLISHMENT—CONSENT OF TOWNSHIP BOARDS.

   Where a resolution of a board of supervisors, adopted pursuant to Act No. 21, Pub. Acts 1905, provides that no expenditure for a drain shall be authorized until permission in writing shall be signed by "at least a majority of the members of the township board or boards affected by" the proceedings, a majority of the members of each board affected is necessary, a majority of the members of the several boards collectively not being sufficient.

3. CONSTITUTIONAL LAW — LEGISLATIVE POWERS — DELEGATION — BOARDS OF SUPERVISORS—TOWNSHIP BOARDS—DRAINS.

   A resolution of the board of supervisors of a county, adopted pursuant to Act No. 21, Pub. Acts 1905, providing that no expenditure for a drain shall be authorized until permission in writing shall be signed by a majority of the members of the township boards affected thereby, is not invalid as an attempt by the board of supervisors to delegate to the township boards the authority reposed by the statute in the supervisors, but is a valid legislative protection of township rights.

4. SAME—TOWNSHIP BOARDS—INDIVIDUAL MEMBERS.

   That the authority to withhold their assent to the proceedings is conferred upon the members of the township board, instead

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of upon the board, is immaterial, since the power is not of a legislative character, and the members in giving or withholding their assent act as business agents of the township.

5. DRAINS—RESTRAINING CONSTRUCTION—CERTIORARI—REMEDY.
A bill in equity will lie to restrain the construction of a drain on the ground that requirements prescribed by the board of supervisors pursuant to Act No. 21, Pub. Acts 1905, have not been complied with, since the proceedings to establish the drain may be regular and not open to the certiorari provided by the general drain law, and still there be no compliance with the supervisors' requirements.

Appeal from Montcalm; Davis, J. Submitted April 10, 1908. (Docket No. 15.) Decided May 26, 1908.

Bill by Chester E. Chandler against Charles L. Heisler, county drain commissioner, to restrain the construction of a drain. From a decree for complainant, defendant appeals. Affirmed.

Fred L. Williams, for complainant.

John Nichol, for defendant.

MONTGOMERY, J. The bill in this case was filed to restrain the defendant from proceeding to construct a drain without having procured the assent of a majority of the members of the township boards of the townships through which the drain extends. The proceeding rests upon the provisions of Act No. 21 of the Public Acts of 1905, which is an amendment to the general drain law, and provides that the boards of supervisors of certain named counties, including Montcalm,

"May from time to time, by resolution, fix and determine such further conditions than those herein set forth, to be complied with, before all or any contract shall be made or entered into for the construction, improvement or clearing out of any drain as hereinbefore provided, as to such boards shall seem necessary and proper to protect all persons and townships that may be affected by the proceedings; and no contract or expenditure shall be

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made or entered into by the drain commissioner or his deputy, without first complying with such conditions."

Acting under the authority of this law, the board of supervisors of Montcalm county, at the October session, 1905, passed the following resolution:

"Resolved, That pursuant to said Act No. 21 of the Public Acts of 1905, the county drain commissioner shall not enter into any contract for the construction, improvement or clearing out of any drain and no expenditure shall be made therefor without having first obtained permission in writing to that effect, signed by at least a majority of the members of the township board or boards affected by such action of the county drain commissioner."

The circuit court granted the relief prayed, and the defendant appeals to this court.

It is contended that, if it was the purpose of Act No. 21 to confer power upon the board of supervisors to fix a condition that would render a general law of the State inoperative, it is unconstitutional. Section 38, article 4, of the Constitution, provides:

"The legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers of a local, legislative and administrative character as they may deem proper."

In *Albert* v. *Gibson*, 141 Mich. 698, the precise question of whether authority corresponding to that delegated to the board of supervisors by the act in question was within this provision of the Constitution was presented and such authority affirmed. See, also, *Hurst* v. *Warner*, 102 Mich. 238 (26 L. R. A. 484), and *Friesner* v. *Charlotte Common Council*, 91 Mich. 504. As was said in *Albert* v. *Gibson:*

"It has been frequently held by this court that the laying out of drains is a mere neighborhood matter."

It is peculiarly a matter control of which might be delegated to townships, cities, or boards of supervisors within the terms of this constitutional provision.

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It appears that a majority of the aggregate number of the members of the township boards of the three townships affected by this drain signed the permission in writing provided for by the resolution of the board of supervisors, but not a majority of the several boards of the townships affected. It is contended that this was sufficient to answer the requirements of the resolution, and *Brady* v. *Hayward,* 114 Mich. 326, is cited as authority. That case presented a very different question. In that case, the court was dealing with the sufficiency of a petition filed under a statute which required that the petition should be signed by not less than five freeholders of the township or townships in which such drain or the lands to be drained thereby and to be assessed therefor may be situated, one or more of whom shall be the owners of the lands liable to be assessed for benefits. The contention made was that the petition must be signed by not less than five freeholders of each township. The court held that this was not required.

It will be noticed that a fixed number of freeholders was required by the statute, and that a residence in any of the townships in which the drain was to run answered the requirements, and it required but one of the petitioners to be the owner of lands liable to be assessed for benefits. The freeholders in this case were in no sense representatives of the township or townships. For they acted in their own behalf and in their individual capacity, whereas the resolution in question in this suit was adopted under the authority of the legislature which gave the board the right, and imposed the duty of protecting all persons and *townships*, and, obviously, the purpose of the requirement was to protect the several townships, and the signers of the permission were in their action acting in protection of their several independent townships, and the language employed must be construed with reference to the plain purpose in reposing this authority, and the requirement that the permission shall be signed by a majority of the members of the township boards of the townships af-

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fected, when so construed, requires the action of a majority of the members of each of the township boards, as the townships were necessarily acting severally.

But it is contended that, if this construction be placed upon the action of the board of supervisors, then it must be considered an attempt on the part of the board to delegate to the township boards of the various townships the authority reposed in the board of supervisors by Act No. 21 in question, and the case of *City of St. Louis* v. *Russell*, 20 L. R. A. 721 (116 Mo. 248), is cited to show that this would render the action invalid. The case is one in which the city, acting under authority to license and regulate livery stables, passed an ordinance which required any person, before commencing to build a building for that purpose, to secure the consent of the owners of a majority of the property in the block in which the building was situated. It was held that this was a delegation of the power reposed in the council and was not authorized.

The case of *City of Chicago* v. *Stratton*, 162 Ill. 494 (35 L. R. A. 84), distinguishes this case and holds that a delegation of the power to fix the location of a livery stable is not effected by an ordinance prohibiting the location of one upon a street where two-thirds of the buildings are devoted to residence purposes, except where a majority of the lot owners on such street consent in writing to the location of a livery stable there.

We need not determine whether these cases may be reconciled, or as to which case makes for the better rule. Both cases are dealing with an attempt by the municipality to control a proposed business acting under the police power. It may be assumed that any person has a right to engage in the business of keeping a livery stable subject only to the legitimate exercise of the legislative authority, either State or municipal, in fixing such restrictions as the public health or convenience may require. But we know of no rule which confers upon anyone a vested right to a proposed new undertaking in the nature

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of a public improvement. And so it is that under the general drain law and many similar enactments, public improvements are stayed until there shall be a petition of a stated number of those directly interested. This is not a delegation to the persons whose signatures are required of legislative power. It is rather a legislative protection of individual rights. So in this case, the township is liable to assessment for a portion of the benefits derived from a public drain. Either wisely or unwisely the legislature has conferred upon the board of supervisors the authority to fix conditions in these various counties, and, under the delegated legislative authority, the board in the county of Montcalm has determined that no such improvements shall be entered upon unless, in addition to all the requirements fixed by the general drain law, the assent of the several townships shall be obtained in the manner prescribed by the resolution above quoted.

Criticism is made of this action upon another ground, namely, that the board of supervisors has conferred upon the individual members of the township board authority of a legislative character, and that this is unauthorized delegation of authority. We do not regard this power conferred as legislative in its character. The individual members of the township board are authorized to withhold their assent for the purpose of protecting the interests of the township from an unnecessary or excessive burden. They act as conservators of the townships' interests—not in a legislative capacity. They are the business agents of the township for this purpose. The fact that they are not convened for the purpose of taking this action as a board does not affect the validity of their action. They are constituted the agents of the township, and individual action by members of the board is not unusual. For instance, the supervisor may approve the bond of the treasurer. 1 Comp. Laws, § 2354. The supervisor or clerk may approve of the security given by constables, and under the general tax law—section 3922—it is provided:

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"Where any statement, certificate, or record is required to be made or signed by a school district board or a township board, such statement, certificate or record may be made and signed by the members of such boards, or a majority thereof, and it shall not be necessary that other members be present when each signs the same."

We think it was within the power of the board of supervisors, acting in its legislative capacity, to dispense with the formality in the action required of the township board.

It is contended that a bill in equity will not lie to restrain the construction of this drain, and that certiorari is the proper remedy. Section 3 of chapter 5 of Act No. 254 of the Public Acts of 1897—the general drain law—provides for certiorari, and also provides:

"Notice of such certiorari shall be served on the county drain commissioner within ten days after the copy of the final order of determination of such commissioner in establishing any drain has been filed with the county clerk as provided in section one of chapter four."

Section 1 of chapter 4 requires that the certified copy of such order of determination shall be filed with the county clerk within 5 days after the order is made, that is, the order establishing the drain. The same section then proceeds to impose the duty upon the drain commissioner of giving notice of the time and place of letting, which should be not less than 10 days, so that the certiorari provided for was evidently intended as a means of reviewing the action of the drain commissioner in establishing the drain.

Section 14 of chapter 9, which was added by the amendment of Act No. 21, Pub. Acts 1905, simply confers upon the board of supervisors authority to fix and determine further conditions than those prescribed in the general act to be complied with before any contract shall be made or entered into for the construction, improvement, or clearing out of any drain, so that, although all the proceedings of the establishment of the drain may be regular and not open to complaint on certiorari, there is under this section

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and the action of the board an additional requirement which has been omitted, and there would seem to be no way to protect the rights of the complainant except by the present remedy. If it be suggested that an appeal might be taken under chapter 5, it is a sufficient answer to say that such an appeal would not be permissible in this cause because it would be to the township board, which has a duty inconsistent with that required when sitting in review of the proceedings. As bearing upon the question of whether a remedy in equity is open, see *Hinkley* v. *Bishopp*, 152 Mich. 256; *Hoffman* v. *Shell*, 151 Mich. 669.

The decree should be affirmed.

BLAIR, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

ENGEL *v.* LADEWIG.

1. DEEDS—RESERVATIONS—LIFE ESTATE—HUSBAND AND WIFE AS GRANTORS.

   A husband owning a fee in land, and his wife owning an inchoate right of dower therein, may give a conveyance that passes the title in fee, or may impose any limitations they see fit; whence they may reserve a life estate to themselves and the survivor of them.

2. SAME—RESERVATIONS—CONSTRUCTION—LIFE ESTATE—LIEN FOR PAYMENTS.

   A deed containing the words "grant, bargain, sell and confirm" and the covenants of warranty and seisin in common use in warranty deeds, reserving to the grantors "all right, title and control so long as we or either of us shall live" and directing that the grantee shall pay "out of the

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above described real estate" certain sums to the grantors' children, creates a life use for the grantors, and provides a lien upon the land for the payment of the sums mentioned.

3. MORTGAGES—REDEMPTION—RIGHT OF REMAINDERMAN—FRAUD OF LIFE TENANT.

Where, by connivance with the life tenant of certain land, her brother bought a mortgage thereon and foreclosed it and deeded the land to her for the purpose of cutting off the remainderman's title, he is entitled to redeem by paying the amount of the mortgage, less the value of an annuity equal to the annual interest charge payable by the life tenant during her expectancy of life as shown by the standard life tables.

Appeal from Ottawa; Padgham, J. Submitted April 10, 1908. (Docket No. 29.) Decided May 26, 1908.

Bill by Gustav Engel against Charles Ladewig and Maria Engel to redeem from a mortgage foreclosure. From a decree for complainant, defendants appeal. Affirmed.

Smedley & Corwin, for complainant.

Walter I. Lillie, for defendants.

MOORE, J. Complainant is one of the children of defendant Maria Engel and Frederick Engel, now deceased. Defendant Charles Ladewig is a brother of Maria Engel. On November 20, 1899, Frederick Engel was the owner of a fractional forty acres of land which on that day, his wife, Maria Engel, joining in the deed, he conveyed to the complainant. The farm was mortgaged for $200, the money having been paid to Gustav at the time the mortgage was given for personal property he sold his father.

The deed was in the usual short form of warranty deed, and after the description of the lands, in the blank space was written:

"We, the parties of the first part, reserve all right, title and control so long as we or either of us shall live, and after the death of us, said party of the second part shall pay out of the above described real estate the follow

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ing sums of moneys to the within named persons, to wit: To our son Wilhelm Engel the sum of two hundred dollars; to our daughter Elizabeth Voelker the sum of one hundred dollars; to our daughter Malvine Sharp the sum of one hundred dollars; to our daughter Mathilde Engel the sum of one hundred dollars; to our grandson John Bruisema the sum of one hundred dollars; said above sums of money shall be paid one year after our death, and this indenture shall have no effect until said sums of money have been paid; the amount of $100 set forth to our grandson John Bruisema shall not be paid to him until he is twenty-one years of age."

Then follows the habendum clause, with the covenant of seisin, and warranty against encumbrances, as follows:

"Except a mortgage of two hundred dollars given to Benton Green, and that we will and our heirs, executors and administrators shall warrant and defend the same against all lawful claims whatsoever, except the mortgage aforesaid."

Then follow the signatures of the said Frederick and Maria Engel and seals, and the acknowledgment was taken before the said Charles Ladewig, notary public. The deed was delivered to the grantee on its execution, and by him later placed on record. The father, Frederick Engel, died in January, 1900; after that the mother stayed upon the farm. Gustav worked the farm on shares, dividing the proceeds with his mother. The second year a disagreement arose between Gustav and his mother and it ended in his leaving the management and control of the farm to her since that time. The father paid the interest on the mortgage for the year 1899. The mother, Maria Engel, paid the interest the next year, 1900. No more interest was paid. In 1902 the defendant Ladewig procured an assignment of the mortgage and later foreclosed it, by advertisement, and upon receiving a sheriff's deed of the premises he conveyed the land to his sister Maria Engel, by warranty deed, who offered the land for sale, asking $1,600 for it, and it was from a prospective pur-

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chaser that Gustav first learned that Ladewig had bought the mortgage, foreclosed it, and deeded the land to his mother. He then tendered the amount of the mortgage and interest to Ladewig, who refused to take the money. This suit was then brought to allow him to redeem the land.

The case was tried in open court. After hearing all the testimony the trial judge expressed himself in part as follows:

"I am satisfied that the agreement and understanding between Mrs. Engel and her brother, Charles Ladewig, was fraudulent in respect to the rights of Gustav and if not an active fraud was a legal fraud on his said rights under all evidence in the case. I am of the opinion that Gustav Engel should be allowed to redeem this property by paying what the law, under the circumstances, would require him to pay at this time. By the terms of the said deed from the parents to Gustav, he, Gustav, did not assume or agree to pay the said mortgage held by Benton Green, the only obligation resting upon Gustav was to pay the mortgage in the case of foreclosure, to protect his own title to the property, and in case of his neglect to do that he would lose it.

"The proofs in this case show Maria Engel to be sixty-two years of age. Her expectancy, as shown by the life tables introduced in evidence, would be 12.86 years. The interest she was required to pay was $10 per year on a principal of $200, the amount of the mortgage, reckoning interest at five per cent. The amount she would be required to pay for the said 12.86 years, calculating the present worth of $10, would amount to $92.87. Deducting this amount from $200 leaves $107.13 which Gustav Engel, as remainderman, should pay to redeem this property. He should not be charged with any costs of the foreclosure, and, under the circumstances of the case, no costs will be allowed either party in this cause."

From a decree rendered along the lines of the opinion, an appeal is taken to this court.

Counsel concede that, if the title to the land had been in Frederick Engel and wife jointly, the first provision in the deed would have reserved to both the use of the

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property during their natural lives and to the survivor during his or her natural life, but he argues:

"But the title to the land was in Frederick Engel. His wife, Maria Engel, had only her inchoate right of dower therein. Could Frederick Engel reserve to his wife a greater estate than she owned? Could Maria reserve to herself a greater estate than she was then possessed of? To both questions we answer, No."

He then cites many authorities and claims:

"So we say that this reservation gives to Frederick Engel a life estate in the farm during the lives of himself and his wife; at the death of the survivor of the two, and not before, was Gustav to have the use of the land (providing all other conditions are complied with, of course). Frederick Engel dying before his wife, his estate descends to his heirs and shall be held by them during the life of his widow. This leaves Maria then with her right of dower, to wit, the use of an undivided one-third of the land, and the children,—Gustav, Wilhelm, Elizabeth, Malvine and Mathilde,—with the use of the remaining two-thirds during the life of Maria, their mother."

The trouble with this argument is that it ignores Frederick Engel. He was owner of the fee. His wife was the owner of an inchoate right of dower. The two could give a conveyance that passed the title in fee or they might impose any limitations they saw fit. They in fact used language that reserved to both of them or the survivor of them the use of the land so long as either of them lived. 1 Jones on Real Property, §§ 525, 526; *Cable* v. *Cable*, 146 Pa. 451; *Cates* v. *Cates*, 135 Ind. 272.

With reference to the other provisions in the deed. The whole deed must be read together to find out the intention of the grantor. The words of the deed are "grant, bargain, sell * * * and confirm," and the grantor binds himself by the covenants of warranty and seisin which form a part of the warranty deed in common use in this State. And the condition, read in the light of the grant, is to be interpreted as creating, as to the first

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provision, a life use for the grantors, and as to the other provisions a lien upon the land for the payment of the sums of money mentioned therein. *Hitchcock* v. *Simpkins*, 99 Mich. 198; *Martin* v. *Cook*, 102 Mich. 267.

There was an abundance of testimony to show that the defendants planned to have the mortgage foreclosed for the purpose of cutting off complainant's title and having it inure to the benefit of the defendant Maria Engel. This being so, the only other question calling for consideration is, Upon what terms should complainant be allowed to redeem?

The rule has been stated as follows:

"The general doctrine of contribution applies to such owners, but is modified in its operation by the new element of inequality in the nature of their respective estates. As has already been shown, the holder of a partial interest is always compelled to redeem the whole mortgage. By a settled rule of the law, the life tenant, A, is bound to pay the annual interest on the mortgage accruing during his own lifetime. * * * This is his own debt, and for what he thus pays in keeping down the interest, he is not entitled to any contribution from B, the owner in fee. When, therefore, A redeems the mortgage, a certain part of the money paid to the mortgagee would be the equivalent of the annual interest on the mortgage which A was obliged to pay at all events, and this part, being his own debt, need not be refunded to him by B; but all of the mortgage debt over and above such part equitably belongs to B to pay; it is the share which should fall upon him by virtue of his reversionary interest.

"The problem then is to ascertain what portion of the total mortgage debt represents the annual interest on the mortgage which A is bound to pay during his life; subtracting that amount from the total sum, the balance is the share which B must contribute, and for which A may hold the mortgage as a lien on the land. An element of uncertainty—the duration of A's life—is inherent in the problem; but the courts, both of England and of this country, have adopted the standard 'life tables' as the basis of calculation in all such cases. The rule is settled that the present worth of an annuity equal to the annual interest running during the number of years which A is

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liable to pay as his individual indebtedness." 3 Pomeroy on Equity Jurisprudence (3d Ed.), § 1223.

See, also, *Campbell* v. *Campbell*, 21 Mich. 438; *Damm* v. *Damm*, 91 Mich. 424, 109 Mich. 619; *Hodges* v. *Phinney*, 106 Mich. 537; *Lewis* v. *Wright*, 148 Mich. 290.

The decree is affirmed, with costs of this court.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

TOLSMA *v.* JAMES E. SCRIPPS CORPORATION.

1. INJUNCTION—DENIAL—LACHES—COMPARATIVE DAMAGES.
   An injunction to restrain the obstruction of an area between the buildings of complainants and defendant will not be denied on the ground that complainants have delayed commencing suit until its issuance would cause defendant more damage than its refusal would cause complainants, where long before defendant's building was commenced defendant was notified that complainants insisted upon the area being left open, and tendered defendant the amount of money required by their deed and contract to entitle them to have it left open, which defendant refused.

2. SAME—DENIAL—GROUNDS—ABSENCE OF INJURY TO COMPLAINANTS.
   An injunction to restrain the obstruction of an area between the buildings of complainants and defendant will not be denied on the ground that defendant is leaving open an area which will be much more advantageous to complainants' building than the one in controversy, complainants being entitled to decide that matter for themselves as long as they keep within their legal rights.

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Appeal from Wayne; Brooke, J. Submitted April 10, 1908. (Docket No. 36.) Decided May 26, 1908.

Bill by Charles S. Tolsma and Alexander S. Tolsma against the James E. Scripps Corporation to enjoin a building upon certain premises. From a decree for complainant, defendant appeals. Affirmed.

Thomas O'Hara, for complainants.

Jasper C. Gates (*Herbert C. Munro*, of counsel), for defendant.

MOORE, J. This is an appeal from an order of the circuit court for the county of Wayne, in chancery, Brooke, circuit judge, issuing a writ of injunction restraining defendant and appellant from "building upon or otherwise obstructing above the grade line" a certain area or space upon defendant's land, 6 feet wide northerly and southerly by 31 feet, 8 inches long easterly and westerly, lying next to and southerly of a portion of the "Tolsma Building" which is situated on the southwest corner of State and Rowland streets in the city of Detroit. Both parties claim title under John Atkinson and James Atkinson, who on the 1st day of June, A. D. 1886, owned lot 55 and easterly 10 feet of lot 56 of section 8 of the Governor and Judges' Plan of Detroit. The plat attached will aid in understanding the situation.

Complainants are the owners of the north 27 feet of this property. Defendant is the owner of the remainder. In November, 1907, defendant commenced the construction of its building. The bill of complaint was filed December 4, 1907, the order appealed from granted December 13th, and the appeal perfected December 17th. The rights of the parties grow out of a contract dated May 31, 1886, and a deed of June 1, 1886, both of which were placed upon record and both of which appear in the record at length.

The important claims of the appellant are as follows:

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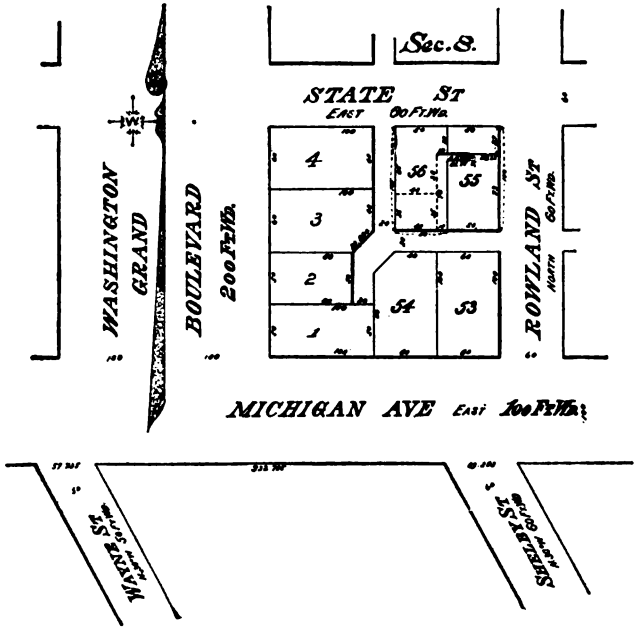
"*a.* Complainants claim that the rights of the parties are governed by the contract of May 31, 1886, Exhibit I, and that, therefore, the area in question extends to the west line of the Atkinson property and is 31 feet, 8 inches in length.

"*b.* We contend that Exhibit I was superseded by the deed of June 1, 1886, and that the 'area' was 'in the jog caused by the north wall of the Tribune building' and is, therefore, only 21 feet, 8 inches in length and covers no part of lot 56.



"*c.* We claim that, under their deed from James J. Atkinson, complainants' rights are limited to 'the area of space between' said dwelling on said 27 feet and the Tribune building, and that no part of Lot 56 was ever between these buildings."

It is sufficient reply to these contentions to say that a fair construction of the deed entitles the complainants to

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an area 31 feet and 8 inches in length, the rear of said area to be 60 feet from Rowland street.

It is further claimed:

"An injunction ought to be denied because complainants have delayed commencing suit until the issuing of an injunction would cause more damage to us than its refusal would cause to complainants. Moreover this delay was for the purpose of extortion."

This claim has no merit. Long before the building was commenced defendant was notified that complainants insisted upon the area being left open and tendered to the defendant the amount of money required by the deed and contract to be paid to entitle complainants to have the area left open. The defendant refused to take this money and proceeded to erect its building.

Counsel further say:

"It is clear from the answer and the affidavits of the three architects that even if complainants were right in their claims as to the location and character of the area in question, that the area which we are leaving open is very much more advantageous. It leaves open four tiers of windows instead of the two which would be left open if the area was constructed according to their claims. The area we are leaving open is 150 per cent. larger, it opens into a 10-foot alley communicating with the public alley, thus giving air circulation as against a mere unventilated well hole of insignificant proportions which would be left if complainants' contentions were sustained."

It is not for the defendant to decide what would be most advantageous to complainants; as long as they are within their legal rights that is a matter for them to decide. The contract and deed were both of record. The correspondence shows that defendant knew about them and their terms long before it commenced to build. As before stated, it knew that complainants insisted upon having the area. It acted at its peril. There is a full discussion of the last two propositions of the solicitors for the defendant in *Ives* v. *Edison*, 124 Mich. 402 (50 L. R. A. 134),

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where there is a large array of authorities gathered and cited.

The other contentions of counsel have been examined. We do not deem it necessary to discuss them.

The decree is affirmed, with costs.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

WIPFLER *v.* WIPFLER.

1. DEEDS—DELIVERY—SUFFICIENCY.
   Where a husband prepared, signed, and acknowledged certain deeds naming his wife as grantee, and kept them in his own possession for several years, and on the eve of departing on a journey handed them to his wife with instructions that if anything of a fatal nature should befall him she should have them recorded, which she did forthwith, though he returned in safety, there was a sufficient delivery to pass title to her, since he reserved no right to recall the deeds.

2. SAME—DELIVERY TO GRANTEE'S HUSBAND.
   Where a husband bought property with his own funds, taking deeds therefor naming his wife as grantee, the delivery of the deeds to him was sufficient to vest the title in her.

3. TRUSTS — RESULTING TRUSTS — CONVEYANCE TO PURCHASER'S WIFE.
   Under section 8835, 3 Comp. Laws, no relief can be granted a husband against his wife with respect to property which he bought with his own funds, taking deeds therefor naming her as grantee.

Appeal from Wayne; Brooke, J. Submitted April 13, 1908. (Docket No. 44.) Decided May 26, 1908.

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Bill by Charles Wipfler against Lucy Wipfler for a divorce, to set aside a deed, and to compel the conveyance to complainant of certain real estate. From a decree for complainant, defendant appeals. Modified.

Charles R. Robertson, for complainant.

William C. Gottman (*Jonas B. Houck*, of counsel), for defendant.

MONTGOMERY, J. Complainant filed a bill for divorce, also praying to have set aside a deed of certain lands made by complainant running to the defendant, and to compel the conveyance by defendant to complainant of certain other lands, title to which was taken in defendant's name, the consideration price having been paid by complainant. The complainant prevailed on all points in the court below and defendant appealed. The ground for the divorce alleged was extreme cruelty. The circuit judge, who saw the witnesses and noted their appearance upon the stand, was of the opinion that the case of extreme cruelty was made out. We are not disposed, upon the record made, to disturb the circuit judge's finding upon this question.

Upon the question of the right to set aside the deed executed by complainant and placed in defendant's hands, we encounter what we deem a legal obstacle to granting the relief prayed. The equities of the case are undoubtedly very strongly with complainant, and if the rules of law would admit, we should unhesitatingly grant the relief prayed. The property involved represents substantially all the earnings of the complainant for a lifetime, and the insistance by the defendant upon her legal rights, which will result in turning complainant out almost penniless, is most unconscionable and inequitable. We have struggled to find authority for relieving complainant in the case, but upon a full consideration and a re-examination of the question determined by this court in *Dyer* v. *Skadan*, 128 Mich. 348, we are unable to find such authority.

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Complainant's testimony is that he prepared, signed, and acknowledged the deeds in question, and retained them in his possession for several years, but that in the month of August, 1890, when about to take a railway trip to the G. A. R. encampment, which he deemed hazardous on account of a strike of the employés of the road he would travel over, he, before leaving home, handed the deeds to the defendant with instructions that if anything of a fatal nature should befall him, she should have the deeds recorded; that he returned in safety, and several years thereafter found that defendant had caused the deeds to be recorded during his absence on this trip. The defendant denies that there was any condition annexed to the delivery of the deeds to her, but asserts that complainant handed her the deeds telling her to record them, and instructing her in what office to have them recorded. But assuming complainant's version to be correct, the transaction constituted a delivery of the deeds to the grantee without any express reservation of the right to recall them, and with intent that in a certain contingency they should be effective, without any further act on the part of the complainant.

The case of *Dyer* v. *Skadan* reviews the authorities and follows the rule laid down by this court in *Dawson* v. *Hall*, 2 Mich. 390, that a delivery of a deed by a grantor to a grantee in escrow or upon condition is effectual to pass title presently. This question has arisen and is considered and discussed in a vast number of cases. Many cases may be found in which the manual custody of a deed had been entrusted to the grantee temporarily and evidence was admitted to show that no delivery was intended. But these cases when examined and analyzed are found to be, we think, cases in which there was no intent that the deed should take effect ultimately without any further act on the grantor's part if the condition upon which it was delivered should be performed. See a discussion of this subject in *Gilbert* v. *Insurance Co.*, 35 Am. Dec. 543 (23 Wend. [N. Y.] 43), in which case it

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was held that leaving the deed in the hands of the grantee to be by him transmitted to a third person to hold in escrow until the happening of a certain event is not a delivery to the grantee so as to vest title in him. But in that case it is manifest that nothing but the bare possession of the deed was vested in the grantee, and it was not to be retained except by a breach of faith. The deed could not presently take effect in the hands of the grantee, nor could it take effect without an intervening act by the grantor or his agent. In the present case, no act of the grantor was required which was not performed. It is true the condition which it is attempted to annex to the delivery has not been fulfilled, but had the death occurred, no other act of the grantor was essential to the passing of title. The case of *Gilbert* v. *Insurance Co.*, it should be stated, was later distinguished and its doctrine questioned by so able a jurist as Judge Selden in *Braman* v. *Bingham*, 26 N. Y. 491, in which it was sought to avoid delivery of a deed on the ground that it was deposited with the grantee with instructions to leave it with one of the clerks of the register's office, and it was contended that these facts showed that there was no delivery with intent that title should pass. It was held, however, that it was immaterial whether these facts were properly pleaded; that if the answer, in addition to what it contained, had embraced these facts, it would not, in the opinion of the court, have presented a defense. Referring to *Gilbert* v. *Insurance Co.*, it was said:

"In that case, the grantee had deposited the deed with the third person in pursuance of the arrangement, the condition had not been performed, and the grantee made no claim under the deed. The case presented merely the question, whether the grantor still retained an insurable interest in the premises described in the deed, the nominal grantee testifying to the terms in which the deed was delivered to him. Limited to its peculiar circumstances, no fault can be found with the decision; but if the grantee had retained the deed, claiming that its delivery to him was absolute, and in a contest between him and the grant-

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or parol proof of a conditional delivery had been offered, I think the result would have been different. If I am wrong in this conclusion, the case discloses an avenue for the overthrow of titles, by parol proof, which was supposed to be closed by the rule to which it would seem to form an exception. * * * If a delivery to the grantee can be made subject to one parol condition, I see no ground of principle which can exclude any parol condition. The deed having been delivered to the grantee, I think the parol evidence that the delivery was conditional was properly excluded."

See, also, *Foley* v. *Cowgill*, 5 Blackf. (Ind.) 18 (32 Am. Dec. 49); *Worrall* v. *Munn*, 5 N. Y. 229 (55 Am. Dec. 330).

But if we assume it to be correct to hold that a deed may be delivered to a grantee as a mere agent or bailee of the grantor to transmit such deed to a third person to hold in escrow, it does not aid the complainant in this case. Nor do we know of any authority which goes to the extent of holding that a deed delivered to a grantee with an intention on the part of the grantor that it shall be subject to a future condition, but with no express provision for recall by the grantor and requiring for its validity no additional act on the part of the grantor or any third person, can be defeated by parol proof of such condition.

Certain Michigan cases are cited which are claimed to make for a different rule. *Pennington* v. *Pennington*, 75 Mich. 600, cited by complainant, was a case which perhaps may be said to recognize the principle of *Gilbert* v. *Insurance Co.* In that case deeds had been prepared by the grantor and deposited with a third party not to be delivered during complainant's lifetime. The testimony tended to show that it was understood that the deeds were subject to the grantor's order. Some months after the execution of the deeds the grantor gave an order to the grantee, directed to the custodian, asking him to deliver up the deed to the grantee. The testimony showed that the order was given in order that the deed might be taken to

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the grantor so that arrangements could be made for taking from the grantee security to be given to otheir heirs of the grantor, which the grantor intended as a condition to letting the grantee have title, and that in fraud of the grantor, the grantee caused the deed to be recorded. This was clearly a case in which it was never expected that the deed in the hands of the grantee should have effect on any condition or in any contingency. It was a clear case of a breach of faith on his part.

The case of *Schuffert* v. *Grote*, 88 Mich. 650, was a case in which a father executed a deed to a son and handed it to him, the son atthe same time handing it back to him and saying that he didn't desire to take possession of the property until the father's death. The testimony showed that the deed was signed, acknowledged, witnessed, and handed to the son and by him immediately handed back to the father. One of the witnesses to the deed testified that the father said that he—

"Calculated to deed that property to Charles, that his son Gus had had his share, so that there would be no trouble after he was dead; that the father said he would not like to see the deed go on record until after he was dead; and that Charles said that he need not be afraid the deed should go on record, and that he could keep it himself."

The court construed this testimony as showing in effect that there was no intentional present delivery of the deed, that it was retained in the grantor's possession, and that it was not the intention of the grantor to convey either the title or possession to the son at the time.

The case of *Burk* v. *Sproat*, 96 Mich. 404, has no bearing upon the present case, as in that case the deed was never delivered into the possession of the grantee, but was placed in the hands of a third party, as the court held, subject to recall by the grantor.

The case of *Chick* v. *Sisson*, 95 Mich. 412, was also a case which might be controlled by the principle of *Gilbert* v. *Insurance Co.*

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The case of *Hogadone* v. *Insurance Co.*, 133 Mich. 339, was a case where a deed was executed and placed of record by the grantor but never delivered to the grantee. It is well settled, and the case recognizes the fact, that the record of a deed by the grantor is not necessarily a delivery, but simply evidence of a delivery, and it was held that the title had not passed.

The case of *Roup* v. *Roup*, 136 Mich. 385, was very similar in its facts to *Schuffert* v. *Grote*, supra, and it was held that there was no delivery and acceptance by the grantee, the custody of the deed being retained by the grantor.

We find no case cited from Michigan, therefore, contrary to the conclusion which we reached in *Dyer* v. *Skadan*, supra. See, also, *Tabor* v. *Tabor*, 136 Mich. 255; *Wilbur* v. *Grover*, 140 Mich. 187; and *Nolan* v. *Garrison*, 151 Mich. 138, in which the rule in *Dyer* v. *Skadan* is recognized. It must be held that the deed in question passed title to the defendant.

Certain property known as the Hamtramck property was purchased by complainant, and deed from the grantor was made to the defendant, by complainant's direction. The deed was delivered to the complainant and retained by him. That such delivery was sufficient to vest title in the defendant, see *Thatcher* v. *St. Andrew's Church*, 37 Mich. 269. We see no escape from holding that this vested title in the defendant irrevocably and defeated complainant of any equitable remedy to recover the property.

Section 8835, 3 Comp. Laws, provides:

"When a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the persons named as the alienee in such conveyance, subject only to the provisions of the next section."

Which provisions have no relation to the question here.

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The case is clearly within the statute. See *Barnes* v. *Munro*, 95 Mich. 612; *Winans* v. *Winans' Estate*, 99 Mich. 74. It is beyond our power to grant complainant relief as to this property.

The decree must be modified as indicated by this opinion. But the want of equity and good conscience in defendant's attitude in this case is so marked that we are disposed to exercise our discretion and withhold any award of costs.

GRANT, C. J., and BLAIR, CARPENTER, and MCALVAY, JJ., concurred.

DE KALLANDS v. WASHTENAW HOME TELEPHONE CO.

1. MASTER AND SERVANT — PERSONAL INJURIES—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

   In an action by the employé of a telephone company for personal injuries, evidence examined, and *held*, that whether it was the duty of the company to have furnished plaintiff with a sufficient quantity of insulated wire, and whether it discharged that duty, were questions for the jury.[1]

2. SAME—FELLOW-SERVANTS—CONCURRING NEGLIGENCE OF MASTER.

   An employé may recover for the negligence of his employer, although the negligence of a fellow-servant contributed to the injury.

3. SAME—METHOD OF WORK — NEGLIGENCE OF SERVANT — QUESTION FOR JURY.

   In an action by the employé of a telephone company for personal injuries, *held*, under the evidence, to be a question for

[1] As to liability of electric company to employé injured by shock, see note to *Western Union Tel. Co.* v. *McMullen* (N. J.), 32 L. R. A. 851.

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the jury whether the plaintiff's method of drawing two wires across certain other highly charged wires at once was more unsafe than to draw them one at a time.

4. SAME—PROXIMATE CAUSE OF INJURY.
Where, in an action by the employé of a telephone company for personal injuries, there was evidence from which the jury might have found that the defendant was negligent in not furnishing plaintiff with a sufficient quantity of insulated wire, and plaintiff's injuries were caused by another employé allowing the wires they were stringing to sag and come in contact with a trolley wire over which they were crossing, it was not error to refuse to direct a verdict for defendant on the ground that the uninsulated wire was not the proximate cause of the injury.

5. SAME—ASSUMED RISK—APPLICATION OF DOCTRINE.
The doctrine of assumed risk applies, and is limited in its application, to dangers which the employé either actually knows or should know.

6. SAME—IGNORANCE OF DANGERS—EFFECT.
Actual ignorance of the dangers of the employment will not alone suffice to relieve an employé from his assumption of the risks of the employment; the ignorance must also be excusable.

7. SAME—NEW DANGERS.
The doctrine of the assumption of obvious risks applies as well to those risks which arise or become known to the employé during the employment as to those in contemplation at the original hiring.

8. SAME—BASIS OF DOCTRINE—CONTRACT OF EMPLOYMENT.
The doctrine of the employé's assumption of the risks of his employment rests upon the contract of employment, which the law implies he accepts with all the risks incident to the employment, without regard to the magnitude of the danger.

9. EVIDENCE — JUDICIAL NOTICE—PHYSICAL CHARACTERISTICS OF OBJECTS—ELECTRICITY.
Electricity is to be classed with gunpowder, dynamite, and other dangerous and treacherous and destructive agents, of whose dangerous qualities courts take judicial notice, as well as of the fact that society recognizes them and acts accordingly.

10. MASTER AND SERVANT — ASSUMPTION OF RISK — OBVIOUS DANGERS.
It is not merely the physical surroundings of the servant that

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must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or, at least, to an ordinarily prudent servant, under the circumstances, that there is danger in such a situation.

11. Same—Direction of Verdict.

When there is a possible phase of a case where the risk was not assumed, the trial judge cannot properly direct a verdict on the ground that such risk was assumed.

12. Same—Telephone Lineman — Risk Assumed — Question for Jury.

In an action by an employé of a telephone company for personal injuries received while stringing a line of wire, caused by the wire coming in contact with a trolley wire, evidence examined, and *held*, that whether plaintiff actually had knowledge of what constituted a grounding of himself or of the telephone wires, and whether he was ignorant of the fact that he was not insulated while in his position on the pole, were questions of fact for the jury.

13. Same—Ignorance of Danger—Effect.

A servant employed by a telephone company as lineman cannot avoid the effect of his assumption of the obvious risks of his employment by showing his ignorance of what constitutes a grounding, and whether he was insulated while upon a pole in contact with telephone wires, since the danger from contact with highly charged wires was a characteristic risk of his employment, and it was implied in the contract of employment as lineman that he knew those things with reference to the creating of grounds and circuits which a telephone lineman must necessarily know in order to conduct his business with any degree of safety whatever to himself, his employer, or his co-employés.

14. Same—Employer's Negligence.

The rule that an employé does not assume the risk of dangers arising through the negligence of his employer does not apply to cases where the negligence and the resulting danger are discovered by and known to the employé before entering upon the performance of the work; to hold otherwise would be to apply to such cases the rule which is only applicable in cases where the risk grows out of the violation by the employer of statutory provisions for safeguarding employés.

Error to Washtenaw; Kinne, J. Submitted April 13, 1908. (Docket No. 53.) Decided May 26, 1908.

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Case by Valentine G. de Kallands against the Washtenaw Home Telephone Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

A. J. Sawyer & Son, for appellant.

Frank A. Stivers and *M. J. Lehman*, for appellee.

BLAIR, J. Plaintiff brought this action to recover for injuries received by him while in the performance of his duties as a lineman in the employ of defendant in stringing wires for a telephone, which he had been directed to put in by defendant. The declaration contains one count and charges as negligence:

(1) The failure to furnish a sufficient number of competent fellow-servants.
(2) The failure to furnish properly covered or insulated copper wire.
(3) The failure to furnish suitable and proper hand lines.
(4) The failure to furnish suitable reels.

Upon the conclusion of the plaintiff's case, the defendant moved the court to direct a verdict for the defendant, which motion was denied. The motion to direct a verdict was renewed by defendant at the close of the case and again denied. Defendant also submitted requests to charge, requiring the direction of a verdict, which were refused by the court and the case was submitted to the jury upon the question whether the defendant had negligently failed to furnish insulated copper wire, the court having determined the other allegations of negligence against the plaintiff. Defendant has removed the record to this court for review upon writ of error, insisting that a verdict should have been instructed in favor of the defendant for the reasons:

(1) That the plaintiff's injuries were due to the negligence of a fellow-servant.
(2) Because the plaintiff had chosen an unsafe way of

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stringing the wire when a safe way was equally open to him.

(3) That the failure to furnish insulated wire was not the proximate cause of the injury.

(4) That the plaintiff assumed the risk of the dangers due to the use of uninsulated wire.

(5) That the defendant was not guilty of negligence.

Plaintiff testified as follows as to his experience:

"I worked for the company here in the city about seven months, perhaps six or seven, and for the Bell Telephone Company for about a year altogether. That would make two years very nearly that I worked at the business, lacking a few months. I think I was at the University about three months. I did whatever I was told to do. * * *

"I worked for the Wash. Light & Power Co., too. I did what they told me to, if I could do it. I always attempted to obey orders. If I did not know, somebody quickly explained it to me. I did not always, when they told me to do anything, find out what it meant and why it was done. * * *

"I passed my degree as an apprentice, and first got my card as an apprentice, and after I had shown myself competent for the business, was given a full fledged lineman's card. I think I received that card from the hands of the union about June, 1904. I was hurt in August, 1905."

He was assisted in the work in question by a young man by the name of Werner, who had worked for the company for some time and who was, as he testified, a competent assistant.

The stringing of the wires required them to cross over an electric trolley wire and certain electric light wires.

Plaintiff testified that Mr. Spence, the wire chief of defendant company, gave him a card with the address of the place that he was to put the telephone in.

"All these companies simply give an order to put in light or telephone in such a house, or wire such a house, that is all there is to it. We have sense enough to know that we have the job in our hands, and we have to go and do it. And we take such help and material as we

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please, and go and do it, if the help and material are there. We are not instructed how to climb the pole or throw the line or draw it or anything of that kind. That is part of the work that we are expected to know enough to do. * * *

"I cannot recollect who got the material for me when I got the order to put in this telephone. Henry Werner was to help me. Henry and I went and got the material, * * * and loaded it onto the wagon. * * *

"*Q.* They did not select the wire for you?

"*A.* We had to take what there was, there was none to select from. They did not select the wire.

"*Q.* You did not enter any complaint to them that there was not any such wire there as you wanted?

"*A.* I spoke about it, yes, sir.

"*Q.* To whom did you speak?

"*A.* Mr. Spence, I think.

"*Q.* What did you say to Mr. Spence?

"*A.* I simply mentioned the fact, I cannot remember the words or anything, but merely the fact that I mentioned the absence of covered wire on the day when I went over the trolley the first time, because we did not have enough that time, and I had to splice it out with bare wire in order to make the whole space between the poles.

"*Q.* Did you make any complaint to Mr. Spence that you did not have covered wire to make this connection?

"*A.* I asked for more, yes. * * *

"*Q.* Did he make you any answer at all?

"*A.* Oh, yes, but I cannot remember it. * * * I couldn't have selected the kind of wire or the proper wire, there was none other. There was nothing to select from. I took all there was, and then I told Mr. Spence that there was no copper wire and he told me to finish the job."

Plaintiff further testified:

"The pole that I went up in the first place was exactly on the corner, and I was practically stringing my wires across to the cross corners from that, diagonally, but on the other two corners were two Bell Telephone Company's poles carrying about three arms full of wires. It might be about 30 wires, something like that, and I had to cross over them and about three feet, I think about that, our wires extended perhaps higher, and then on the other side

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of them, perhaps six feet out farther, these Bell wires were about 20 feet from the pole, I think, I am not sure, and about six feet on the other side of them the Light & Power Co.'s arc light wires were running parallel with those Bell wires, and beyond those were one or two guy wires that were helping to hold up these poles on the corner, and underneath all of those the trolley wire ran parallel with the street running up the hill, running right along the center of the street in the same direction with the street, and I had to throw the rope I had in the first place over the top of all these wires, because our wires were higher than any of those and I had to bring it up over everything and clear all. * * *

"*Q.* You were right in there mixed up among the wires?

"*A.* Yes, not way up, but so my head and shoulders were on a level with the first armful of wires."

He knew his clothes were wet, and that damp clothes, damp weather, damp anything was more likely to attract electricity, and he knew what a live wire was, and that a wire that is charged with electricity, whether light or heavy, is a live wire, and he knew that every one of the wires he was going up among was a telephone wire and in constant use and was charged with electricity.

"*Q.* Before you commenced to string this wire on Saturday afternoon and when you got up your pole, you could see all the dangers that were there, you could see every wire, and you were above the trolley wire, you could see the electric light wire, you could see all the wires there could you not?

"*A.* Yes.

"*Q.* You knew they were there before you commenced work?

"*A.* Yes, sir. * * *

"*Q.* When did you first learn that it was dangerous to cross a trolley wire with these telephone wires?

"*A.* I always understood it was dangerous to cross any highly charged electrical wires.

"*Q.* What do you mean by always understood? You mean ever since you commenced the business at all?

"*A.* Ever since I can remember I have understood it was unsafe to handle highly charged wires.

"*Q.* How long since you found out that it was danger-

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ous when crossing wires that you must be careful not to touch those wires with the wires you were stringing?

"*A.* I have taken it for an understood fact, I cannot remember the date.

"*Q.* It has been an understood fact with you ever since you first commenced the business?

"*A.* Yes.

"*Q.* When you started out with your card to install this telephone you knew how to install it, did you not?

"*A.* Yes, sir.

"*Q.* And you knew the system of crossing electric light wires and trolley wires, you knew the system by which that was done?

"*A.* Yes. * * *

"*Q.* You took the chances, you knew what you had?

"*A.* Yes, I knew what boy I had, I knew what wire I had, and I knew what rope I had, and I knew the danger of crossing that wire. * * *

"*Q.* You could see this danger?

"*A.* No, sir.

"*Q.* You could see that trolley wire?

"*A.* I could see the danger of a chance of dropping that wire.

"*Q.* You could see the danger if he did drop it?

"*A.* Yes, sir.

"*Q.* You knew if he did drop it what the result would be?

"*A.* No, sir."

Plaintiff further testified that he instructed Henry Werner to hold onto the wires:

"Explained to him that if the wires, after I had drawn them along a little ways, if they were allowed to lie loose they would go down onto the Bell wires, which we were instructed to not interfere with in any manner, and also down onto the trolley which would have, of course, spoiled our work, because it would burn our wires, and cause us to do it all over again, or spoil some of the Bell phone wires by crossing the wires; I instructed him that if any strong electric shock came through there, and he would get it by hanging onto the wires, to step back onto the tar sidewalk and he would, in my opinion, insulate himself completely, because it was a very dry, hot day; after I told him that I proceeded up the road with the end of the rope, and went to the pole with it and pulled

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the rope over hand over hand in order to get the wire to me, and cautioned Henry Werner several times to be very careful, and not to let the slack of the wire down onto the trolley. I think we were about fifteen feet above it when we kept the wire up tight. * * *

"*Q.* At the time you gave the boy instructions, what had you principally in mind, what was your purpose in warning him?

"*A.* Why, I thought on account of crossing over so many wires, and the trolley wire and everything else, of course, I supposed we were running the chance of dropping it onto those wires and I thought he might get a sound or something and imagine he was badly hurt, and drop the wires and then we would have to do all the work over again, if they dropped down onto the trolley wires *and the trolley might burn our wires in two because our wires passed over the pole and onto the ground, and it would burn and ground our wires so we would have to do our work all over again, and it might spoil some of the Bell phone wires and phones.*

"*Q.* What would it do to you if that boy let those lines sag so it would strike the trolley wire, what would happen to you?

"*A.* I had no idea at that time, I thought I was well insulated by being upon this dry cedar pole.

"*Q.* You were right in there mixed up among the wires?

"*A.* Yes, not way up, but so my head and shoulders were on a level with the first armful of wires.

"*Q.* Did you know at that time how those wires were grounded?

"*A.* No. * * *

"*Q.* Did you know you were in any danger from those wires at all?

"*A.* No. I did not have the least idea."

One of defendant's experts testified that, in his judgment, plaintiff got in the most dangerous position in doing his work that he could, except to lie on the cross wires, and that unless he was trying to commit suicide, plaintiff had little apprehension of the danger that he was in, and that he should judge he was wholly incompetent to do that kind of a job or was incapable of appreciating the danger. Plaintiff also testified that this was the first tele-

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phone wire he ever ran; it was the first job the company ever gave him to take and do alone, and it was the first time he ever went out to string a wire of any length; never ran one as far as this; had only done this kind of work working with other men; never had charge of a similar job before; and had never appreciated any danger. He understood that if a wire touched the trolley wire up in the air it would have been charged with electricity from the trolley wire, but he thought at the time if he were insulated from the ground, he couldn't be affected by electricity in the trolley wire because the other electricity is in the rails themselves and he did not think it could hurt him; that he did not know that there couldn't be a live wire without its being grounded. He did not know that if the wire touched the ground and touched the trolley wire it was grounded and would hit him, and had no idea that touching the ground would affect him. He did not know at the time how the wires were grounded but he learned afterwards. He learned afterwards that they led back to the central office and were there connected with the ground. He knew nothing about it at the time. He did not have the least idea that he was in any danger from those wires that touched his body. He was ordered to have this job finished without fail by Saturday night and had worked about a day and a half when he was hurt, through the wire in some way getting away from Werner, the assistant, and falling upon the trolley wire and the ground, causing him quite serious injuries.

5. There was an abundance of testimony to justify the trial judge in submitting to the jury the question whether it was the duty of defendant to have furnished the plaintiff with a sufficient quantity of insulated wire and whether it discharged such duty.

1. Even if the evidence were undisputed that the wire fell upon the trolley wire through the negligence of plaintiff's fellow-servant, Werner, this fact would not have authorized the instruction of a verdict, since an employé

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may recover for the negligence of his employer although the negligence of a fellow-servant contribute to the injury. *Lockwood* v. *Tennant*, 137 Mich. 305.

2. Whether the plaintiff's method of drawing two wires across at once was more unsafe than to draw them across one at a time was, upon this record, a question of fact for the jury.

3. The trial judge did not err in refusing to instruct a verdict on the ground that the uninsulated wire was not the proximate cause of the injuries. *Swick* v. *Cement Co.*, 147 Mich. 454; *Logan* v. *Railway Co.*, 148 Mich. 603; *Warren* v. *Railway Co.*, 141 Mich. 298; *Southwestern Telegraph & Telephone Co.* v. *Robinson*, 50 Fed. 810 (16 L. R. A. 545).

4. Assumed risk. This raises the really serious question in the case. The principles underlying the doctrine of assumed risk were examined at some length in *Bradburn* v. *Railroad Co.*, 134 Mich. 575. It was there said:

> The doctrine of assumed risk applies, and is limited in its application, to dangers which the employé either actually knows or should know."

See, also, *Harrison* v. *Railway*, 137 Mich. 78.

In *Ragon* v. *Railway Co.*, 97 Mich. 265, it was said:

> "The master has a right to expect him to be alert to inform himself of existing conditions, and he cannot attack the master from the shelter of unjustifiable ignorance of the business, machinery, and methods which he is employed to use. Actual ignorance will not alone suffice to charge a master; the ignorance must also be excusable."

In *Foley* v. *Light Co.*, 54 N. J. Law, 411, it was said:

> "The immunity of the master rests upon the contract of hiring. The master says to the servant: You understand fully the nature of the employment and the danger attending it; will you enter upon it? The servant says: I accept it; and the law implies that he accepts it, with all the risks incident to it, without regard to the magnitude of the danger."

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It is the general rule that the doctrine of the assumption of obvious risks applies as well to those which arise or become known to the employé during the employment as to those in contemplation at the original hiring. 26 Cyc. p. 1180; *Kean* v. *Rolling Mills*, 66 Mich. 277.

In *Warren* v. *Railway Co.*, supra, it was said:

"Electricity is to be classed with gunpowder, dynamite, and other treacherous and destructive agents, of whose dangerous qualities we may take judicial notice, as well as of the fact that society recognizes them, and acts accordingly. No prudent man handles these things with a low degree of caution."

It is also well settled, however, as stated in *Burns* v. *Telephone Co.*, 70 N. J. Law, 745:

"It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or, at least, to an ordinarily prudent servant, under the circumstances, that there is danger in such a situation."

See, also, *Smith* v. *Car Works*, 60 Mich. 501; *Ribich* v. *Smelting Co.*, 123 Mich. 401 (48 L. R. A. 649).

And when there is a possible phase of the case where the risk is not assumed, the trial judge cannot properly direct a verdict on the ground that such risk was assumed. *Murphy* v. *City Coal Co.*, 172 Mass. 324.

Davis v. *Thresher Co.*, 126 Mich. 429, is quite similar in principle to the present case. In that case the plaintiff's regular employment was as a helper in the machine shop, but, needing a man to take the place of one Riggs, who looked after the electrical wiring of the lighting plant for defendant, defendant had selected Davis to fill this position in addition to his regular duties. Davis had been engaged in assisting a regular electrician in rewiring the plant and repairing the same and had had some two or three months' experience prior to the injury which resulted in his death. He had been informed that contact with a live wire was dangerous and his attention had been

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called at one time to a flash of fire that came from a guy rod to a water tank tower with which one of the wires in question accidentally came in contact. There was no evidence that Davis knew the extent of the current, and, as stated by his counsel in their brief:

"He did not know these live wires were carrying such a dangerous current nor how dangerous contact might be made, nor the precautions necessary, and he received no instructions on that point or warning of the danger, except possibly the most general kind of a warning from Riggs, as he was ascending the ladder, to look out for the electric light wires. Riggs had been doing this wiring around the premises for some time, but he was not a lineman, nor did he profess to be, and seems to have been ignorant of the precautions which should have been taken in crossing live wires with another wire which might form a ground connection, but Davis had no knowledge of this ignorance and it only developed on the trial."

Davis, after crawling with the wire he was to string under the electric light wires,—

"Attempted to walk westerly on the south side of the east and west gable, and as he did so he seems to have slipped, as the testimony puts it, and, either to save himself from falling or thoughtlessly, he took hold of the electric wire with his hand. In the other hand he held the bell wire, the coil of which Riggs had on his arm standing on the ground, which formed a complete ground connection. The electric current passed from the wire through his arm and body, and down this wire into the ground, and killed him instantly."

The ruling of the circuit judge directing a verdict was affirmed on the ground that the plaintiff had assumed the risk.

Referring to *Smith* v. *Car Works* and *Ribich* v. *Smelting Co.*, supra, the court said:

"In each of these cases the injured party was ignorant of any danger of injury. In none of them was it held that it is the duty of the master to foretell the exact extent of the injury likely to follow any negligence of the warning of danger. This is never precisely known in the

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case of an obvious danger. If deceased knew that contact with this wire would cause him severe injury, he had sufficient warning. This is all the most expert could have known in advance, and there can be no doubt on this record that deceased knew this."

It is apparent, from the testimony of the plaintiff himself, that he fully understood the danger of contact with the trolley wire or the electric lighting wires, but it is insisted on his behalf that he did not know that he would come in contact with the trolley wire in case the wire which he held in his hand fell upon it; that he supposed that he was insulated by being upon the dry cedar pole and did not know that the live telephone wires which were in contact with his body were grounded; or that if the wire he was stringing got away from his helper and fell upon the ground that would create a circuit through his body. As to whether the plaintiff actually had knowledge of what constituted a grounding of himself or of the telephone wires, and as to whether he was ignorant of the fact that he was not insulated while in his position upon the pole, were questions of fact for the jury. As to whether plaintiff's lack of knowledge was justifiable or not presents another question. We think it must be held that it was not.

It was said by the court in *Chisholm* v. *Telegraph Co.*, 176 Mass. 125:

"The danger from an imperfectly insulated wire is the most characteristic risk which a lineman has to encounter. That general risk the deceased assumed by entering upon his employment."

So in this case the danger from contact with the highly charged wires, which, in a city the size of Ann Arbor, in view of modern conditions, plaintiff was likely to have to pass over with the wires of defendant, was a characteristic risk and the principal risk which he was likely to have to encounter. Contact with the highly charged wires might be formed and was most likely to be occasioned by other means than seizing hold of said wires,

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and we think it was implied in the contract of hiring plaintiff as a lineman that he knew those things with reference to the creating of grounds and circuits which a telephone lineman must necessarily know in order to conduct his business with any degree of safety whatever to himself, his employer, or his co-employés. We also think it must be held that knowledge of the grounding of defendant's telephone wires was such an essential fact in their business that the plaintiff, who had worked in their employ as "trouble man," lineman, ground man, and otherwise for over a year, must be charged with constructive notice of such fact.

It is argued, however, that, regardless of his knowledge, actual or constructive, of the negligence of his employer and the danger involved in consequence thereof, he is protected by the rule that the employé does not assume the risk of dangers arising through the negligence of the employer. While the rule is well settled, it does not apply in cases where the negligence and the resulting danger are discovered by and known to the employé before entering upon the performance of the work. To hold otherwise would be to apply to cases like the present the rule which is only applicable in cases where the risk grows out of the violation by the employer of statutory provisions for safeguarding employés. *Swick* v. *Cement Co.*, 147 Mich. 454.

The judgment is reversed, and a new trial ordered.

MONTGOMERY, CARPENTER, and MCALVAY, JJ., concurred. GRANT, C. J., concurred in the result.

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SCHWARTZ *v.* MINERAL RANGE RAILROAD CO.

1. RAILROADS — INJURIES AT CROSSINGS — CONTRIBUTORY NEGLIGENCE—PRESUMPTIONS.

   The presumption that one killed at a railway crossing, in the absence of testimony as to his conduct, did not fail to take proper precautions before attempting to cross the track, cannot be indulged to support a verdict against the railroad company in a case where it appears that shortly before reaching the crossing deceased stopped his team and took a position on the side of his load from which a train, according to the schedule, might be expected, but on the opposite side from that which the train in fact came, and went from thence to the crossing without stopping.

2. SAME—CONTRIBUTORY NEGLIGENCE.

   Where trains from the east and from the west were due to pass a crossing at shortly before 1:35 and shortly after 1:55, p. m., respectively, the fact that it was after 1:55 when deceased approached the crossing did not justify him, considering the season of the year and the locality, in withdrawing his attention entirely from the east.

Error to Ontonagon; Cooper, J. Submitted April 14, 1908. (Docket No. 5.) Decided May 26, 1908.

Case by Kate Schwartz, administratrix of the estate of John Fravert, deceased, against the Mineral Range Railroad Company for the negligent killing of plaintiff's intestate. There was judgment for plaintiff, and defendant brings error. Reversed.

A. B. Eldredge and *A. E. Miller*, for appellant.

P. H. O'Brien, for appellee.

BLAIR, J. This is an action for the negligent killing of one John Fravert on the 3d of February, 1904. The accident occurred on the Chicago, Milwaukee & St. Paul Railway, where the same crosses a public highway known

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as the Rockland road, running from Ontonagon to Rockland. This highway, at the point in question, crosses the railway at an angle of about 65 degrees, the railway running northwesterly and southeasterly; the highway at the point of crossing running almost due north and south. The crossing is about one mile east of the village of Ontonagon, and almost immediately west the railway begins to curve, and descends a sharp grade into the village of Ontonagon. One thousand one hundred and forty feet east of the center of the crossing is a whistling post, and at this whistling post the railway has commenced to curve quite sharply to the southeast. On the east side of the highway, 197 feet from the railway track, is a barn. On the southerly side of the railway, 56 feet south of the south rail and extending 1,080 feet from the crossing easterly, was a high, board, snow fence, 7 feet 6 inches in height, with an average space between the boards of about 2½ inches, the widest spaces being 5½ inches. Some of the spaces were only an inch.

The highway sloped down to the railway track, and, at a point 96 feet south, was, in its natural condition, 3½ feet higher than at the crossing.

At the time in question there was snow upon the ground, to a depth of two or three feet in the traveled part of the highway. The snow thrown out by the snow plows of the railroad company into the highway at and near the crossing had been thrown up on each side of the highway for a distance of 15 to 20 feet back from the crossing. Its height was in dispute; the witnesses for the plaintiff claiming that it was 6 or 7 feet high, the defendant's witnesses, that it was from 4 to 5 feet.

By reason of the removal of the snow from the railroad track, the inclined 96 feet above referred to had, at the time of the accident, been shortened up so that for the last 30 feet it was quite sharp; and the witnesses are all agreed that a loaded team which started down this incline could not be stopped until it had reached the track.

The track east of the crossing is in a cut, the south

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bank of which is about 6 feet above the track at the crossing and gradually decreases in height to the east end of the snow fence which stands upon it.

"It is on a bank about 3 feet above the highway and about 6 feet above the level of the railway track."

Defendant's train, which struck and killed plaintiff's intestate, was due in Ontonagon at 1:35 p. m. and due to leave on its return trip east at 1:55 p. m. The accident occurred at about 2:05 p. m.

The only witness of the accident testified as follows:

"I saw John Fravert that day about a mile on the other side of the crossing, or a mile and a half, on the Rockland side of the crossing. I was coming to Ontonagon with a load of hay. John Fravert was hauling wood to Ontonagon with a double team of horses. He had a big load of cordwood. I was behind him. I drove right up pretty close to him, 5 or 6 feet may be, the team was behind. We stopped once at the barn up there by the crossing; I mean the barn that is near the railroad crossing; it is on the right-hand side as we were going along. We stopped on the railway side of the barn.

"*Q.* What did John Fravert do, if anything, after you stopped there?

"*A.* He changed over onto the left-hand side of the load, and started up, went down to the crossing. Just as he got on the crossing the train came along and struck him. The train ran into the load and dragged him down the track, and threw the sleigh off the railroad.

"*Q.* Now, state whether you were listening for a train as you were approaching that crossing?

"*A.* Yes, I was listening for a train. I did not hear any whistle blown or bell rung. I was about 15 or 20 feet from the crossing when the train went by. The snow was piled up pretty high from the barn to the crossing on both sides. * * *

"*Q.* Now, how was the snow with reference to that fence, how high was it?

"*A.* Well, it was piled up pretty high; I think it was up to the top of the fence all right, if it wasn't over. Coming from the barn along the highway, towards the railway, I couldn't see a train until it got to the crossing, then I seen it pretty near to the crossing.

"*Q.* Why couldn't you see the train?

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"*A.* Well, there was too much snow piled up there. * * * It was a pretty cold day, and he was well bundled up. I didn't notice whether he had his cap down over his ears or not. It was a very cold day. He stopped at the barn two or three minutes anyway, stopped to rest his horses, and then he changed to the other side of the track, of the sleigh, that is nearest on—that is towards the west; the left-hand side, so that the way the train came, the wood was between him and the train.

"*Q.* And then he went down to the crossing from that spot without stopping at all?

"*A.* Yes.

"*Q.* The team walking?

"*A.* Yes.

"*Q.* Now, when you say that on account of the snow a man couldn't see from the barn across that fence, you mean a man walking in the highway?

"*A.* Yes.

"*Q.* You could have seen from the top of that load of hay if you had looked?

"*A.* Yes, I guess I could. * * * From the top of the load of hay I seen the train when it was about 20 or 25 feet from where the wagon road crosses—I guess 20 feet; and then the train was coming towards the crossing, about 20 feet from the crossing. * * * At the time that Fravert stopped there I didn't know what he stopped for; he didn't say what he stopped for.

"*Q.* Now, did you know whether he stopped to rest his horses or not?

"*A.* No, I did not. I had my cap pulled down, but I guess I could hear all right if there was anything to hear. * * *

"*Q.* Mr. Snyder, do you remember whether you looked toward the east that day?

"*A.* I looked both ways.

"*Q.* Did the bell ring or did it not?

"*A.* No, the bell did not ring.

"*Q.* Did the whistle blow as the train approached from the east?

"*A.* No, the whistle didn't blow; I didn't hear it blow.

"*Q.* Mr. Snyder, you weren't paying any attention to the whistle or bell were you?

"*A.* If the whistle blew, I was right there; I would have heard it.

"*Q.* You weren't paying any attention to it, were you, up where you could see?

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"*A.* Well, I couldn't see much that day; it was pretty stormy.

"*Q.* You weren't paying any attention, were you?

"*A.* O, yes; I was paying a little; I was kind of expecting the train to come along.

"*Q.* You weren't paying any particular attention as to whether that bell rang or the whistle blew, were you?

"*A.* I was right there; if it blew I would have heard it."

It was a stormy day and the snow was drifting with the wind, although it was not actually snowing.

The fireman testified:

"I stopped cleaning the window as soon as I saw the load of wood; I think we were about 200 feet from the crossing then. We had been going through a snowbank and the plow had been throwing snow back against the window, so that it was impossible to see ahead if you did not keep the snow off."

The engineer testified:

"It was not snowing any. Of course, it was windy, and the wind was drifting the snow, so that I was not able to see the crossing ahead until I got a clear rail. A bank of snow extended up to within 200 feet of the crossing, and the only time I had a view of the crossing would be from a point 200 feet from it. * * * My engine carried a plow. * * * My usual speed over that crossing is from 15 to 18 miles or 20 miles—say 15 miles an hour; and the reason why I was running at a greater speed than fifteen miles an hour was to get through those snowbanks. * * * The snow was drifting quite bad, and my view was pretty badly obscured going through the bank, until we were within 200 feet of the crossing, and we passed that two hundred feet in a few seconds."

Defendant's station agent testified:

"I know it was a bad day, snowing or blowing; you can't tell whether it snows or blows in this country; it left the atmosphere kind of snowy."

The testimony was in dispute as to whether a man walking north in the highway from the barn could see a train approaching from the east all the way until he reached the line of the snow fence; the plaintiff's testimony indi-

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cating that from the snow fence to the track a view could not be had until too late to be of service, but that between the snow fence and barn there were places where a train could be seen and places where it could not be seen. As stated in plaintiff's brief:

"A person's ability to see a train approaching that crossing would depend upon his being in a particular spot at the time the train was approaching."

It was stipulated that there is a curve east of the crossing on the railway, at a distance of 1,080 feet from the crossing, and beyond this curve it is impossible to see the train from the highway.

A witness testified that he measured the height of the engine and coaches, and the engine was 12 feet 6 inches from the top of the smokestack to the track. The coaches measured 13 feet 6 inches from the rail to the top of the coach.

At the close of the testimony, defendant's counsel moved for a view of the premises by the jury, whereupon the following occurred:

"*Mr. O'Brien:* I think that we would be willing to have the jury view the premises, but on account of the conditions being dissimilar now as to what they were on that day, as far as snow is concerned, winter time then, summer time now, we object to the train running back and forth.

"*Mr. Eldredge:* The view would not be of any use unless the court will allow the jury to see the train running back and forth.

"*The Court:* I shall allow the jury to proceed to view the premises. * * *

"The court thereupon took a recess for the purpose of having the jury view the premises, and after a view of the premises, and of the train going back and forth, the jury returned to the court-room, and the following proceedings were had:

"*Mr. Eldredge:* We have measured and agreed upon the heights of these two cars that were with us, and the engine, and they are, respectively: the coaches thirteen feet, six and a half inches; that was the passenger coach; and fourteen feet the baggage car and smoker combined,

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and the engine fourteen feet, six. That being the height above the rail of each of them. That would make the baggage car six inches higher than the Mineral Range car, and the engine higher, but I can't recall how much."

At the close of plaintiff's testimony and at the close of the case, defendant's counsel moved for a verdict in its favor on the ground that under the undisputed evidence the plaintiff was guilty of contributory negligence. The same point was made by several requests to charge.

The trial judge charged the jury, among other things, as follows:

"If you find from the testimony that if he looked he could have seen said train in time to avoid his injuries, and you further find from the testimony that he failed to look, then in that case it will be your duty to say that he is guilty of contributory negligence, which will defeat his recovery in this case. On the other hand, if you find from said circumstances which I have outlined to you, and all the other circumstances in the case, that he did look, but by reason of the nature of the crossing and the conditions thereabout he was unable to see the train, and that he took such measures to avoid injuries as a reasonably prudent man occupying his situation under the same circumstances would have taken, then the said John Fravert cannot be said to be guilty of contributory negligence. * * *

"Every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of negligence unless he approaches it as if it were dangerous. Fravert knew that the crossing where the accident complained of occurred was a dangerous one. He was bound to know that a train might be approaching, and if he did not look or listen to ascertain whether one was coming, at every place where he could look or listen, but on the contrary drove directly down from the barn on the south side of the crossing to the track, and that he did so without ascertaining, or using any effort whatever to ascertain whether a train was coming from either direction or both directions, then I charge you, gentlemen of the jury, that John Fravert would be guilty of contributory negligence. In other words, the fact that the train was late did not excuse Fravert from using diligence in ascertaining whether a train was coming from either or both directions upon

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the day in question. It was his duty to use care and precaution in approaching this crossing—such care and precaution as a prudent man would use, and that care and precaution imposed upon him the duty to observe and look and listen continually until he reached that crossing, to ascertain if possible whether a train was approaching either from Ontonagon or from the other direction."

Under this charge and their own view, the jury must have determined that Fravert looked and listened "at every place where he could look and listen," but by reason of the nature of the crossing and the conditions thereabout he was unable to see the train.

There was no evidence whatever that decedent looked or listened at any point, and the finding of the jury can only be sustained upon the ground that, in the absence of any testimony as to decedent's conduct in approaching the crossing, the jury would be justified in finding that he took proper precautions to ascertain whether a train was approaching. *Mynning* v. *Railroad Co.*, 64 Mich. 93; *Underhill* v. *Railway Co.*, 81 Mich. 43; *Schremms* v. *Railroad Co.*, 145 Mich. 190.

But in the case before us there was testimony as to decedent's conduct, showing that after leaving the barn he placed himself on the west side of his large load of cordwood, "so that the way the train came the wood was between him and the train," and then went down to the crossing without stopping at all. There is no room for a presumption or inference that he stopped, that he went, at any point, to the east side of his load, or that he looked towards the east at all.

All the circumstances required great care. The snow was being drifted and whirled through the air by the high wind and tended, with the snow fence, to obscure the view of a train approaching from the east; the wind was blowing strongly away from the drivers and towards the oncoming train, making it more difficult to hear; midway between the snow fence and the track a steep descent began, during which the team could not be stopped. With-

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out pausing for even a second, at the top of the descent or anywhere else, to exercise his senses to the best purpose, either of sight or hearing; without, apparently, taking any precaution whatever against a train from the east, he drove upon the track.

The testimony shows that he knew the time of the trains, that the train which struck him was about due from the west, which adequately explains why he left the east side of his load at the barn and walked upon the west side, where he could see the train if it came from the expected direction. There was no evidence that he was relying upon Snyder to look to the east and warn him, and his conduct was negligent, unless the circumstance that if the train was on time it would be coming from the west excused him from giving any attention whatever to the eastern approach. Considering the short interval between the scheduled arrival and departure of this train, the season of the year and the locality, decedent was not justified in withdrawing his attention entirely from the east after leaving the barn. *Tucker* v. *Railway Co.*, 122 Mich. 149.

We are of the opinion that the defendant's motion for an instructed verdict should have been granted.

Judgment reversed, and new trial granted.

MONTGOMERY, OSTRANDER, HOOKER, and CARPENTER, JJ., concurred.

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GOEBEL BREWING CO. v. MEDBURY.[1]

1. JUDGMENT—ACTION—PLEADINGS—SURPLUSAGE—EFFECT.
   Where the declaration in an action on a judgment contains sufficient allegations as a declaration on a justice's judgment, it will support a judgment against a defendant who had full opportunity after personal service to present his objections in the usual way, though it also contains allegations showing invalid proceedings by which a transcript of the judgment was attempted to be filed in the circuit court, and the declaration purports to be upon the judgment as a circuit court judgment; since the fact that the declaration contains more than sufficient should not be permitted to defeat it.

2. SAME—DEFAULT JUDGMENT—ASSESSMENT OF DAMAGES—ORDER—ENTRY NUNC PRO TUNC.
   Where in an action on a judgment defendant's default was entered without any order for the assessment of damages, and several months later the circuit judge heard the case on assessment of damages, and entered judgment accordingly, a subsequent order amending the default order nunc pro tunc so as to provide for an assessment of damages by the court was properly granted, no appearance having been entered or step of any kind taken by the defendant.

Error to Wayne; Donovan, J. Submitted April 14, 1908. (Docket No. 75.) Decided May 26, 1908.

Debt by the Goebel Brewing Company against Samuel Medbury and others for the amount of a judgment. There was judgment for plaintiff, and defendant Medbury brings error. Affirmed.

Jonathan Palmer, Jr. (*Elbridge F. Bacon*, of counsel), for appellant.

Lewis A. Stoneman, for appellee.

BLAIR, J. On July 10, 1896, the plaintiff obtained a

[1] Rehearing denied September 10, 1908.

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judgment against the defendant Medbury and others after personal service of summons upon him, plea of the general issue and participation in the trial. No appeal was taken from this judgment and its validity is not questioned. Afterwards a transcript of the judgment was filed in the circuit court.

On the 9th day of July, 1906, suit was commenced in the Wayne circuit court by summons, which was later personally served upon defendant Medbury, as appears by the return of the officer and proof of service filed February 28, 1907, as well as by his affidavit filed in answer to an affidavit by Medbury denying such service. On the 1st day of March, 1907, plaintiff filed its declaration, in substance as follows:

"For that, whereas, the said plaintiff heretofore, to wit: on July 10th, 1896, before John McKinley, Esq., a justice of the peace in and for the city of Detroit, said county and State (Simpson Docket No. 1,359) recovered a judgment against the said defendants for the sum of $371.29, which judgment was afterwards, to wit: on September 11th, 1896, removed from said justice's courts of the city of Detroit, to the circuit court for Wayne county, Michigan, by transcript, which transcript appears as transcript No. 2,811 in the files and records of said circuit court for Wayne county, Michigan, and thereupon, to wit: on September 11th, 1896, by the consideration and judgment of said circuit court for Wayne county, Michigan, the said plaintiff recovered against the said defendants the sum of money above demanded, being the sum of $373.29 for damages and costs of said transcript, which sum of money, in and by the said circuit court, was then and there adjudged to the said plaintiff for its damages which it had sustained, as well as by reason of the nonperformance by said defendants of certain promises and undertakings then lately made by the said defendants to said plaintiff as for its costs and charges by it about its suit in that behalf expended, whereof said defendants were convicted, as by the record and proceeding thereof remaining in said court more fully appear, and which said judgment still remains in full force and effect, not reversed, satisfied or otherwise vacated, and the said plaintiff has not obtained any execution or satisfaction of or upon the said judgment so

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recovered, as aforesaid, whereby an action has accrued to said plaintiff to demand of and from the said defendants the sum of money above demanded."

May 16, 1907, defendant's default was entered, without reference to the clerk or otherwise, for an assessment of damages, and on October 2, 1907, judgment on default was entered for $667.21 and costs, as assessed upon a hearing for that purpose by the circuit judge.

October 24th, defendant Medbury moved to vacate the judgment and default rendered against him in said cause. This motion was heard October 28th and denied November 15, 1907. On October 28, 1907, the default order of May 16th was amended nunc pro tunc so as to provide for an assessment of damages by the court. On the 29th day of October, 1907, defendant Medbury filed a written request for findings of facts and law, and on December 9, 1907, the court made and filed such findings, resulting in a determination that plaintiff was entitled to an order overruling the defendant's motion. On the same day, defendant Medbury filed proposed amendments "to the several findings of law," which were refused, and thereupon he filed exceptions to the findings of law and the refusal to amend the findings of law.

All of these proceedings, including the testimony and proceedings before the circuit judge on the assessment of damages October 2d, counsel for defendant Medbury have incorporated in a bill of exceptions and bring the record here for review by writ of error upon 15 assignments of error and numerous subdivisions.

The only defense against the judgment of the justice's court, apparently rendered on a promissory note, is the bar of the statute of limitations. Conceding the invalidity of the transcript proceedings, they left the justice's judgment in full force, and if the declaration in this case may be treated as a declaration on that judgment, the judgment of the circuit court was supported by the declaration. We think it may be so treated. It contains sufficient allegations for such purpose, and the fact that

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it contains more than sufficient should not be permitted to defeat it at the instance of one who had full opportunity after personal service to present his objections in the regular way.

The circuit judge, having heard the case on assessment October 2d, after several months had elapsed, and no appearance having been entered or step of any kind taken by defendant, was justified in entering the order nunc pro tunc. *Bogue* v. *Prentis*, 47 Mich. 124; *Steers* v. *Holmes*, 79 Mich. 432.

The only record before us is the common-law record brought up by the writ of error. The defendant was not entitled to findings of fact or of law. *Brown* v. *Haak*, 48 Mich. 229; *Stafford* v. *Crawford*, 118 Mich. 285.

The judgment is affirmed.

MONTGOMERY, OSTRANDER, HOOKER, and CARPENTER, JJ., concurred.

LAIRD *v.* MICHIGAN LUBRICATOR CO.

1. CORPORATIONS—OFFICERS—AUTHORITY—CONTRACTS—RATIFICATION.

   No ratification of an unauthorized contract of employment made by the secretary-treasurer and manager of a corporation with plaintiff appears where, upon the first discovery of the existence of the contract by the corporation, its validity was questioned, and plaintiff understood that his continued employment was not in recognition of the validity of the contract.

2. SAME—IMPLIED AUTHORITY.

   Under section 7040, 2 Comp. Laws, the secretary-treasurer of

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a corporation and manager of its business under direction of the board of directors, whose term of office is one year, has no implied authority to bind the corporation by a contract of employment of a clerk for a period of three years, and there being no evidence of any custom of the corporation or of a holding out of the secretary-treasurer as having that authority, the contract is unenforceable.

Error to Wayne; Donovan, J. Submitted April 14, 1908. (Docket No. 64.) Decided May 26, 1908.

Assumpsit by Albert G. Laird against the Michigan Lubricator Company for breach of a contract of employment. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Reversed.

Corliss, Leete & Joslyn (*Paul B. Moody*, of counsel), for appellant.

A. J. Groesbeck, for appellee.

MONTGOMERY, J. The plaintiff brought an action to recover damages for the breach of a contract of employment covering the period of three years from the 1st day of February, 1904. The contract purported to be signed on the one part by the plaintiff, and on the other by George C. Morris, secretary-treasurer, on behalf of the defendant company, and provided compensation of $1,500 per year for the term of three years. The plaintiff continued in the employment of the defendant during 1904, and until the 11th of March, 1905, when his employment was terminated. The president of the company, Mr. Corliss, had in January, 1905, told him that his services would not be required, and that he had better seek other employment, and when told by the plaintiff that he had a contract with the defendant, and upon the production of the contract signed by Mr. Morris, he was assured by the president of the company that the contract was not binding. He was allowed to continue, however, until the 11th of March, when his services were finally dispensed with.

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There was no testimony in the case offered by the plaintiff to show that other contracts of employment extending over a period of three years or for any considerable period had been made by Mr. Morris, nor was there any evidence that prior to the time the contract was produced to the president, Mr. Corliss or the directors of the company had any knowledge that such a contract as that involved here had been made. The plaintiff was paid by the week, and received his compensation from the bookkeeper, giving receipts therefor. Mr. Morris became insane in 1904, and was succeeded by John B. Corliss, Jr., in the office of treasurer.

The circuit judge directed a verdict for the plaintiff for the amount of salary stipulated from the time of his discharge up to the date of the commencement of the suit.

It is very obvious that there was no conclusive evidence of ratification, as upon the first discovery of the existence of a contract by the defendant, its validity was questioned, and plaintiff very clearly understood that in his continued employment the company was not recognizing the validity of this contract. The plaintiff's case must rest upon the implied power which the circuit judge seems to have found arising from the fact that Mr. Morris was secretary-treasurer of the corporation and manager of its business under the direction of the board of directors, to justify a contract of employment for a term of three years.

Section 7040, 2 Comp. Laws, provides:

"SEC. 4. The stock, property, affairs and business of every manufacturing or mercantile corporation shall be managed by not less than three directors, who shall be chosen annually by the stockholders at such time and place as shall be provided by the by-laws of said corporation, and who shall be stockholders and shall hold their offices for one year and until others shall be chosen in their stead."

Mr. Morris was elected as secretary-treasurer for the term of one year.

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It would seem clear that in the absence of any evidence of custom or any holding out as possessed of authority other than the bare fact that he was secretary-treasurer and manager, the authority to continue employment not only beyond his term of office but beyond the period during which the entire management of the affairs of the company might be changed by the election of a new board of directors, would not be implied.

A case very much in point is *Camacho* v. *Engraving Co.*, 2 App. Div. (N. Y.) 369, in which a contract made by the defendant's vice-president and general manager for a term of three years was under consideration. The court said:

"But no presumption of law can be indulged in that, because a person acts as such a manager, he has the power to bind his principal to contracts of an extraordinary nature, and of such a character as would involve the corporation in enormous obligations and for long periods of time. If a general manager, simply by virtue of his being charged with the ordinary conduct of the business, would have the right to bind his principal to a contract for service for three years, involving the obligation to pay thousands of dollars of salary to an employé, why may not that power extend indefinitely, so that he may make contracts for all employés for indefinite periods, and thus assume to himself a power which it cannot be supposed was ever intended to be lodged in him?"

The case is in all substantial respects on all fours with the present case. It is cited with approval by this court in *Nephew* v. *Railroad Co.*, 128 Mich. 602. See, also, the cases collected in note to *Carney* v. *Insurance Co.*, 49 L. R. A. 471 (162 N. Y. 453).

The case cited by plaintiff's counsel, *Ceeder* v. *Lumber Co.*, 86 Mich. 541, is not in conflict with the views here expressed. It was assumed in that case that the employment of a sawyer for the season was usual and necessary in the conduct of the business with which the president of the company was entrusted, and it was held that as the primary intention of a corporation in employing an agent

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is that he shall be able to accomplish the purposes of the agency, the power to do whatever was essential to the accomplishment of that object was to be implied. The situation is quite different from that here, as it can hardly be contended that the employment of clerks or subordinates for a term of years is essential to the conduct of the business. Whether there was proof in that case that it was customary to employ sawyers by the season is not made very clear by the decision. But the court would almost take judicial notice that such is the fact. There was no such proof in the present case, and if there be any presumption on the subject, it is quite the reverse as to the employment of clerks and subordinates in an office such as that of the defendant.

The court was in error in directing a verdict for the plaintiff, and the judgment will be reversed, with costs, and a new trial ordered.

BLAIR, OSTRANDER, HOOKER, and CARPENTER, JJ., concurred.

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HARRIS v. NEAL.

1. RAPE—CIVIL ACTION—EVIDENCE—REPUTATION OF PLAINTIFF.
In a civil action for rape, plaintiff's reputation for chastity was not material as bearing upon the probability of her testimony, and proof that her reputation was bad having been admitted in mitigation of damages, the jury were properly instructed that they could consider it for no other purpose.

2. TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE—ALIBI.
An instruction that an alibi, when established, furnishes the best of defenses, because a man cannot be in two places at one and the same time, but the jury should examine such evidence carefully in determining its truth or falsity, *held*, when read with the entire charge, not to improperly suggest a doubt of the credibility of defendant's witnesses.

Error to Livingston; Miner, J. Submitted April 15, 1908. (Docket No. 57.) Decided May 26, 1908.

Case by Celia Harris against James Neal for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

William P. Van Winkle and *William E. Robb*, for appellant.

Albert L. Chandler, for appellee.

CARPENTER, J. Plaintiff alleges that she was assaulted and raped by defendant. She brought this suit to recover compensation. Her testimony supported her claim. Defendant denied having had any intercourse with plaintiff and he introduced testimony tending to prove an alibi. The issue was submitted to a jury who rendered a verdict in plaintiff's favor. Defendant seeks a reversal. Defendant was permitted to introduce testimony tending to prove that plaintiff had a bad reputation for chastity. The trial court held that this testimony could be used

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only for the purpose of mitigating damages. Defendant contends that this was error; that the testimony was "material as bearing upon the probability of plaintiff's testimony."

In the interest of clearness we think it proper for us to distinguish the question raised by defendant's contention from certain other questions which often arise. The question is different from the one which arises when a female witness upon cross-examination for the purpose of affecting her credibility is asked questions imputing lack of chastity. While the law in such cases is not thoroughly settled, this much may be safely stated, that the trial court has authority to exclude such testimony (*Knickerbocker* v. *Worthing*, 138 Mich. 224) and that the answers of the witness are conclusive. The question before us is also to be distinguished from the question which arises when it is sought to impair the credibility of a witness by proof of reputation. In such a case the proof of reputation is confined to reputation for veracity. *Leonard* v. *Pope*, 27 Mich. 145; *People* v. *Abbott*, 97 Mich. 488. The principles governing the admissibility of testimony in the two classes of cases above mentioned have no application to the question before us, and if they had, they would not sustain defendant's contention. The rule invoked by defendant's counsel is a different rule. He invokes the rule applied by this court in *People* v. *Ryno*, 148 Mich. 137. That was a criminal case wherein respondent was convicted of rape. There we held: "The bad reputation of a prosecuting witness above the age of consent for chastity prior to the date of the offense charged" was admissible as tending to prove that the intercourse may have been had by consent, and we reversed the judgment because this rule was violated by the trial court. The rule laid down in *People* v. *Ryno* would be applicable if the case at bar were a criminal case. It, however, is not a criminal case. It is a civil case, and this court has held that that rule is inapplicable to civil cases. *Adams* v.

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Elseffer, 132 Mich. 100; *Knickerbocker* v. *Worthing*, supra.

Adams v. *Elseffer* was a suit brought by the employer Adams against his employé Elseffer to recover moneys alleged to have been misappropriated. As bearing upon the probability of innocence, defendant was permitted to introduce proof of good character. This court held such testimony inadmissible, saying:

"The correct rule, according to the great weight of authority, is that in civil actions the character of a party to the action may become the subject of proof in case, and only in case, it is involved in the issue. And we think the character is involved in the issue only in the cases in which either the right of recovery or the extent of recovery is affected by the character of either the plaintiff or the defendant."

In *Knickerbocker* v. *Worthing*, we applied the same principles, and there we held that defendant, who in a civil case was charged with committing adultery, could not introduce evidence of his good character for chastity. It may be said that those cases are to be distinguished from this because there the question related to the proof of character; here to the proof of reputation. This distinction is not tenable. The ordinary way of proving character — indeed, according to the weight of authority (3 Wigmore on Evidence, § 1983; *People* v. *McLean*, 71 Mich. 309) the only way of proving character—is to prove reputation. And the language of our opinion in *Adams* v. *Elseffer* very clearly indicates that proof of reputation as well as proof of character is inadmissible. Indeed, I think it may be said that the only sound argument which could be advanced for admitting testimony of reputation in such cases is that reputation furnishes evidence of character, and therefore the decision that proof of character is inadmissible is also a decision that proof of reputation is inadmissible. We conclude that proof of reputation was not admissible as bearing upon the probability of plaintiff's testimony, and it follows

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that though admitted for another purpose, it could not be legitimately used for that purpose. The complaint under consideration discloses no error.

2. The trial court charged the jury:

"An alibi when established furnishes the best of defenses, because a man cannot be in two places at one and the same time. But it is your duty to examine such evidence carefully in determining its truth or falsity."

Defendant insists that this last sentence, above quoted, is an unwarranted discrimination. This could be so only upon the assumption that it improperly suggested a doubt of the credibility of the witnesses for the defendant. We do not think the language quoted, especially when read in connection with the entire charge, is open to that objection.

3. We are asked to reverse the decision of the trial court denying defendant's motion to grant a new trial upon the ground that the verdict was opposed to the weight of the testimony. We agree with the trial judge that the verdict was not against the weight of the testimony.

Judgment affirmed.

GRANT, C. J., and BLAIR and MCALVAY, JJ., concurred. MONTGOMERY, J., concurred in the result.

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PETERS v. BIRKETT.[1]

FRAUD—MISREPRESENTATIONS OF VENDOR—DAMAGES RECOVERABLE.

In an action for fraud in misrepresenting the right of head belonging to a water power sold by defendant to plaintiff, it appeared that on a bill by a landowner against plaintiff, to restrain the maintenance of the dam at the height represented, a decree was rendered giving plaintiff the option of reducing the head a certain amount or paying complainant's damages to be assessed, and that plaintiff elected to reduce the head; whereupon the court directed a verdict for defendant on the ground that by electing to damage the power by reducing the head, when he might have preserved it by paying an inconsiderable amount as damages, plaintiff had lost his right of action. *Held*, error, since plaintiff's right of action accrued at once when the representation was made and proved to be false, and the rule of damages was prima facie the difference between the value of the power as it was and what its value would have been had its condition been as represented; that while defendant might show in mitigation of damages that plaintiff might have relieved himself of a part of the damages by paying a less sum under the decree, such showing could not defeat plaintiff's right of recovery, especially as plaintiff might have been compelled to compensate other owners for the injury to their land as well.

Error to Livingston; Miner, J. Submitted April 15, 1908. (Docket No. 90.) Decided May 26, 1908.

Assumpsit under 3 Comp. Laws, § 10421, by Frank M. Peters against Thomas Birkett for fraud in the sale of certain real estate. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

Louis E. Howlett, for appellant.

William P. Van Winkle (*Rollin H. Person*, of counsel), for appellee.

[1] Rehearing denied June 27, 1908.

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MONTGOMERY, J. This is an action in assumpsit brought under section 10421, 3 Comp. Laws, to recover for fraud and deceit in the sale by the defendant to the plaintiff of a mill property described in the deed of conveyance as—

"The mill and all belongings and the water and power privileges, mill dam and mill race which belongs to, or in any wise appertaining to said mill, and all lands flowed by the mill pond so far as the water power and lands flowed belonged to the estate of Joseph Kirkland, deceased."

The property consisted of a mill building erected in 1836 and the water power with which it was run. The water power was created by damming Portage creek, forming a large pond covering many acres of land west of the mill and extending up the creek for a distance of two miles or over. The testimony on the part of the plaintiff tended to show that before the purchase was made, he inquired of defendant how much right of head he had, and that the defendant replied "fourteen feet;" that this statement was in effect repeated in the presence of Mr. Erwin, an employé of defendant, and by him reaffirmed; that the purchase was made in reliance upon these conditions; that later one Floyd Reason, who owned a farm south of the pond, and some 20 rods or more distant therefrom, filed a bill in chancery against plaintiff to restrain him from overflowing his lands; that an injunction was issued; that the defendant was notified of these proceedings, took part in the same, and after a decision of the circuit court in chancery in favor of the complainant in that case, joined in an appeal to this court, becoming a surety on the appeal bond. On the hearing of that case in this court, *Reason* v. *Peters*, 148 Mich. 532, the court found that it appeared by a preponderance of the evidence that the complainant's lands were flooded during the year to a greater extent than they had ever been during ordinary seasons, and that the water had been raised 20 inches above its usual height. The present case was brought after the decision in the chancery case in the court below, and before final determination in this court.

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In the chancery case, the court gave the defendant, the present plaintiff, the option of removing 20 inches of the flashboards, thus reducing the head of water and the ponding capacity of the race by 20 inches, or having the damages which had accrued to Reason assessed and paying the same. The case was remanded to the court below, and the election was made by the present plaintiff to have the decree entered in form requiring a reduction of the ponding capacity by removing 20 inches of the flashboards.

Plaintiff's testimony tended to show that the damages resulting from the necessity of removing 20 inches from the flashboards were from five to eight thousand dollars. When the plaintiff rested, the circuit court directed a verdict for the defendant, saying:

"The Supreme Court gave the plaintiff in this case the option of removing the flashboards or leaving them in. If he had left them in, as he might have done under the decision of the Supreme Court, then the only damages would have been what the damages were to the people who had been damaged by the overflow of the water, and, in the opinion of the court, when he removed those flashboards without the consent or the knowledge of Mr. Birkett, he took it upon himself, and it appears in this case that he understood that if he did that it would damage or almost ruin his mill plant; while if he had left them there, as the Supreme Court gave him authority to do, and let the court assess the damages of Mr. Reason, it might have been much less than $5,000, as it appears in the bill of complaint he only claimed, I think, $500."

We think the court was in error in this holding. The plaintiff's right of action accrued at once when the representation that the deed carried with it a right to a 14-foot head was made and proved to be false, and the rule of damages prima facie would be in such case the difference between the value of the land as it is and what its value would have been if its condition and quality had been as represented. *Page* v. *Wells*, 37 Mich. 415; *Jackson* v. *Armstrong*, 50 Mich. 65.

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It is true that the defendant might have shown in mitigation of damages that the plaintiff could have relieved himself in part of these damages under the terms of the decree of the Supreme Court by a payment of a less sum. This would not have defeated the right to recovery. But it is to be noted that this mill pond covered a large amount of ground, not all of which was owned by Reason, and that the plaintiff might have been compelled by other owners of land to remove his flashboards or to compensate them for the injury to their land as well. So that it by no means appears that the plaintiff could have established his right to maintain this 14-foot head of dam by the payment of $500 or any other inconsiderable sum of money.

We think that the onus was thrown upon the defendant to show that the damage to the plaintiff was not as much as alleged, and that the case should have gone to the jury under proper instructions.

Judgment will be reversed, and a new trial ordered.

GRANT, C. J., and BLAIR, CARPENTER, and MCALVAY, JJ., concurred.

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JOHNSON v. MICHIGAN UNITED RAILWAYS CO

1. CARRIERS — PASSENGERS — WRONGFUL EJECTION — GROUNDS OF ACTION—CONTRACT FOR TRANSPORTATION.

   In an action by a passenger against a carrier for wrongful ejection on refusal to honor a mileage ticket, it is incumbent upon plaintiff to prove that he had a valid mileage ticket, good for transportation according to its terms over the defendant's road.

2. SAME — TICKETS — ACCEPTANCE BY CONDUCTORS — EFFECT AS ESTOPPEL.

   The acts of conductors in permitting passengers to ride upon expired tickets, or upon tickets good only upon certain trains, though often repeated, do not estop the carrier to thereafter deny the passenger's right to transportation contrary to the terms of his contract.

3. SAME—EJECTION—ACTION—EVIDENCE—CONTRACT FOR TRANSPORTATION.

   In an action by a passenger for wrongful ejection and refusal to honor a mileage ticket, not issued by defendant nor its immediate predecessor, but which defendant is shown to have honored without question for several months, evidence examined, and *held*, sufficient to sustain a verdict for plaintiff, especially as defendant offered no explanation of its apparent assumption of the contract and the facts were peculiarly within its knowledge.

4. SAME—EVIDENCE—ADMISSIBILITY.

   Though there was no direct evidence to connect defendant with the company appearing by the face of the ticket to have issued it, evidence by plaintiff that he had traveled over defendant's road frequently between the date of defendant's acquisition of the road and the date of his ejection, and that the validity of his ticket was never questioned, is admissible on the issue whether defendant had assumed the contract.

Error to Calhoun; North, J. Submitted April 15, 1908. (Docket No. 81.) Decided May 26, 1908.

Case by Henry F. Johnson against the Michigan United

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Railways Company for the wrongful ejectment from defendant's car. There was judgment for plaintiff, and defendant brings error. Affirmed.

Sanford W. Ladd, for appellant.

A. M. & C. H. Stearns, for appellee.

The defendant owns and operates an electric interurban railroad between the cities of Battle Creek and Kalamazoo with intermediate stations. Plaintiff on October 20, 1906, presented himself as a passenger on a car upon said road at a usual station in Battle Creek, asking for transportation to a place called the Guide Board, a distance of 6.94 miles. He presented to the conductor a mileage book reading as follows:

"Jackson & Battle Creek Traction Company.
"Mileage Book. 400 Miles.
"No. 2265.
"Issued to
"H. F. Johnson, Augusta, Battle Creek.
"Good only
"When officially stamped and presented with coupons (mileage strip) attached, subject to the conditions named hereon.
"Void for passage after date cancelled in margin.
"F. L. POTTER,
"Treasurer.
"Read all the Conditions and Notices hereon.
"No. 2265."

Each coupon represented a mile. The ticket was issued subject to several provisions, the only one of which material here to note is:

"Detachments will be made by the conductor to cover actual mileage traveled on his train."

The conductor proposed to detach 8 coupons, being transportation for 8 miles. The plaintiff insisted that he take but 7. Plaintiff's testimony upon this point is as follows:

"The conductor came around for his fare, and as he

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came to me I handed up this book, and says: 'Guide Board, 7 miles.' I mentioned 7 miles for the reason that some conductors have taken 8 from the book. He says: 'Eight miles.' 'No,' I says, 'seven.' 'Well,' he says, 'I take 8 from these books. I take 8 or nothing.' 'Well,' I says, 'you cannot take 8 from that book.' He says, 'I shall,' and pulled out his slip, and I reached up and took hold of the book and says: 'Hold on! Don't take 8 miles. It is only 7 miles to the Guide Board.'"

The conductor then demanded that he pay his fare unless he would consent to detaching 8 coupons. Plaintiff refused to pay, and the conductor ejected him from the car. He then brought this action to recover damages, claiming that his ejectment was unlawful. His declaration alleged that he owned a mileage book—

"Issued by, used by, and recognized by defendant as good for the payment of passenger fares upon and over said so-called electric interurban line."

He was allowed to amend his declaration by alleging that the mileage book was—

"Issued by and sold by the Michigan Traction Company at its office in Battle Creek, which last-named company, the defendant herein, on or about the second day of May, 1906, succeeded and assumed the obligations imposed by said mileage book, and which was thereafter repeatedly recognized by defendant as good for the payment of passenger fares."

The defendant introduced no evidence.

Plaintiff testified that when he purchased this ticket the title of the company was the Michigan Traction Company. He introduced in evidence a conveyance made by the Michigan Traction Company to the defendant by which the Michigan Traction Company conveyed to defendant all its franchises and property of all descriptions, real and personal, and also all property which said Michigan Traction Company had purchased from its predecessors at Battle Creek and Kalamazoo in 1898. The description in said conveyance covered the roadbed and route over which the plaintiff was a passenger. The date

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of the conveyance from the Michigan Traction Company to the defendant was May 2, 1906.

Plaintiff further testified that he had traveled over this route from May 2d to October 20, 1906, during which time he had used all the coupons except about 90. On cross-examination he testified he didn't know when he bought the ticket what company was operating the road.

Plaintiff recovered verdict and judgment.

GRANT, C. J. (*after stating the facts*). It was incumbent upon the plaintiff to prove that he had a valid mileage ticket, good for transportation according to its terms over the defendant's road. The ticket on its face was not issued by the defendant or by its assignor, the Michigan Traction Company. There is no direct evidence of the legal existence of a road known as the "Jackson & Battle Creek Traction Company," or that the defendant acquired the franchises and property of such a company. The ticket itself and its use over defendant's road are the sole facts from which it can be inferred that such a company was once in existence. The deed from the Michigan Traction Company to defendant refers to franchises, rights, etc., purchased from its predecessors, but does not state who they were. If this were the only evidence tending to show the validity of the ticket, plaintiff would fail. His own evidence, however, is that he had traveled over the defendant's road frequently between May 2d and October 20th, and that the validity of his ticket was never questioned. The dispute, in consequence of which plaintiff was ejected from the car, did not arise over the ticket, but solely over the number of coupons which should be detached to cover his proposed journey. Shortly after the trouble one J. M. Bramlette, evidently an officer of the company, wrote a letter to plaintiff regretting the occurrence, and asking for an interview with him. The letter had no reference to plaintiff's contract of transportation.

The record is unnecessarily meager. We, however,

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may assume that in the course of its business the coupons taken up by the conductors were turned in to the office of the company, and that its collectors of fares accounted for money and tickets received. Is this evidence that the defendant had assumed the contract which the plaintiff had with the Jackson & Battle Creek Traction Company, and that it was valid? Where a conductor permits a passenger to ride upon an expired ticket, or upon tickets good only upon certain trains, common carriers are not estopped by these acts, though often repeated, to thereafter deny the passenger's right of transportation contrary to the terms of his contract. *Sherman* v. *Railway Co.*, 40 Iowa, 45; *New York, etc., R. Co.* v. *Feely*, 163 Mass. 205; 28 Am. & Eng. Enc. Law (2d Ed.), p. 197. Those and similar cases do not, however, apply to this case. It was there held that the acts of the conductor only waived the obligation of the contract as to the specific occasions. They did not change the terms of the contract or extend it. Those cases involved a violation of the plain terms of the contract. In this case the evidence tends to show an assumption of the contract made with some other company and a recognition of the liability of the defendant thereunder. We think the evidence sufficient to sustain the verdict, especially as the defendant offered no explanation of its apparent assumption of the contract and the facts were peculiarly within its knowledge. The evidence above referred to was received under the defendant's objection and exception. It was all legitimate for the consideration of the jury in determining whether the defendant had assumed the plaintiff's contract. They might fairly assume that the defendant would not for months carry out a contract for which it was not responsible.

We find no error in the record and the judgment is affirmed.

BLAIR, MONTGOMERY, CARPENTER, and MCALVAY, JJ., concurred.

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ALEXANDER *v.* MUD LAKE LUMBER CO.

1. NEW TRIAL—GROUNDS—COMPROMISE VERDICT—SUPPORT FROM EVIDENCE.

   A verdict which is supported by the testimony of one witness is not necessarily a compromise verdict, though for less than the plaintiff claims, and the court instructed that if the jury disbelieved the plaintiff's testimony they should find for the defendant.

2. EVIDENCE—EXPERTS—COMPETENCY.

   A witness who had worked around sawmills all his life, had worked ten years as a filer, and had filed saws in a mill in which plaintiff was employed as a sawyer two years, was competent to express his opinion as to plaintiff's competency as a sawyer.

Error to Chippewa; Steere, J. Submitted April 16, 1908. (Docket No. 111.) Decided May 26, 1908.

Assumpsit by Ellery Alexander against the Mud Lake Lumber Company for breach of a contract of employment. There was judgment for plaintiff, and defendant brings error. Affirmed.

Sharpe & Handy, for appellant.

Doig & Doig, for appellee.

Plaintiff was employed as a sawyer by the defendant at its sawmill at $5 per day. He worked from May 26th to September 26th, when he was discharged. He testified to a contract of employment from May 26th to January 1st following.

Defendant's agent testified that he employed him at $5 per day without any specification as to the time. A witness for the plaintiff testified that he heard the oral agreement for employment, and that it was at $5 per day for the season. The mill shut down for the season December

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1st. The balance due at $5 per day to January 1st was $389. After his discharge plaintiff earned $16 at other employment. The jury rendered a verdict for $264, which covered the time to December 1st, deducting the $16. The jury evidently believed the witness who testified to employment for the season.

Defendant discharged plaintiff for alleged incompetency.

GRANT, C. J. (*after stating the facts*). Two errors are assigned.

1. The court erred in refusing to set aside the verdict and grant a new trial upon the ground that the verdict was evidently a compromise. Under the court's instruction the jury would have been authorized to find for the defendant if they disbelieved the plaintiff's testimony, that he was employed to January 1st. The court did not instruct the jury that they might find a verdict based upon employment to the close of the season, December 1st. In deciding the motion the court said that there was some warrant for making the motion based upon his charge, but an examination of the testimony led him to the conclusion that he went further in the charge than was warranted by the evidence, and that the jury believed the testimony of the witness who testified to a hiring for the season. The court therefore found that it was not necessarily a compromise verdict. In this conclusion we agree with the trial judge.

2. One Southmead, a witness for the plaintiff, testified that he had had experience in sawmills for ten years as a filer, and that he had worked in mills nearly all his life; that he had filed saws in a mill in which plaintiff was employed for two seasons. He described the causes which result in "pulling off a saw." He was then asked the following question:

"*Q.* Now, from your knowledge of sawmill work, and from what you saw of Mr. Alexander's work at that time,

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you may state whether or not you consider him a competent sawyer.

"*A.* I think that Mr. Alexander was an average sawyer, although at the mill that I was in Mr. Alexander was on the night shift all the time and was sawing a different class of logs; at that mill all the logs were sorted, and the day crew had the best show of it; he was working on the night crew."

This testimony was admitted under objection and exception. The objection is that the witness was not shown to have sufficient knowledge upon which to base an opinion as to the competency of the plaintiff. We think the testimony was competent, even under the decision cited by the defendant (*Lewis* v. *Emery*, 108 Mich. 641). It was not necessary that the witness should have been a sawyer in order to become a competent witness. He had had a long experience in sawmills, had observed the plaintiff's work, was able to compare it with others, and testified to other things which rendered him competent to give an opinion.

Judgment affirmed.

BLAIR, MONTGOMERY, CARPENTER, and MCALVAY, JJ., concurred.

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HARMON v. OLD DETROIT NATIONAL BANK.

1. BANKS AND BANKING—PAYMENT OF FORGED PAPER—FICTITIOUS PAYEE.

Where, in an action by the receiver of a railroad company against a bank to recover money paid by defendant out of the funds of the company on a forged warrant, plaintiff showed that a trusted employé of the company erased or caused to be erased, with the aid of others, the name of the real payee and substituted the name of another, who was either a fictitious person or a real one unknown to the drawer, a prima facie case of a fictitious payee was made out.[1]

2. SAME—DEPOSITS—ACCOUNTING—BURDEN OF PROOF.

As between a depositor and a bank, the burden of proving payment by a valid check or other voucher is upon the bank.

3. SAME—PAYMENT OF FORGED PAPER—FICTITIOUS PAYEE—PAYMENT THROUGH OTHER BANK.

Where a bank pays a forged check, or one upon which the name of a fictitious payee has been fraudulently substituted, the fact that the check came to the paying bank through other banks does not relieve it of the duty of investigation to determine the identity of the original presenter with the payee named in the check, and if the paying bank chooses to rely upon the identification accepted by the bank which cashed the check, it does so at its own risk.

4. SAME—FICTITIOUS PAYEE—STATUTE—APPLICATION.

Section 4870, 2 Comp. Laws, making checks drawn in favor of fictitious payees payable to bearer, has application only to cases in which the drawer knowingly draws the check to the order of a fictitious payee, and hence does not apply to a case where a trusted employé of a railroad company fraudulently erased the name of the proper payee in a valid warrant and substituted the name of a fictitious person.

5. SAME—FORGED PAPER—DUTY OF PAYING BANK.

Where, after a proper voucher and warrant issued at Detroit by a railroad company had been approved by the necessary officers, a trusted employé fraudulently caused the name of

[1] As to who must bear loss where check or bill is issued or indorsed to imposter, see note to *Land Title & T. Co.* v. *Northwestern Nat. Bank* (Pa.), 50 L. R. A. 75.

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the proper payee to be erased and one unknown to the maker substituted, and the warrant in due course of business was mailed to the address of the substituted payee in Chicago, and by someone cashed in Denver, the drawee was not relieved of the duty of using due diligence in identifying the payee, since such duty is not changed by the time or place of the forgery, unless the forgery was committed under such circumstances as to show negligence on the part of the drawer.

6. SAME—BURDEN OF PROOF.

Where a warrant issued by a railroad company, payable at a bank in Detroit, was fraudulently altered, after approval, by the substitution, by a trusted employé of the railroad company, of the name of another person, or a fictitious person, as payee, and the warrant was, in the due course of business, mailed to the address given of the fraudulent payee in Chicago, and cashed by a bank in Denver, and subsequently received through several banks and paid by the drawee, the burden was upon the drawee, as between it and the drawer, to show the existence or non-existence of the substituted payee, and that the Denver bank took the proper means to identify him.

7. FORGERY — WHAT CONSTITUTES — INDORSEMENT IN NAME OF FICTITIOUS PAYEE.

Where, through the fraud of a trusted employé, a railroad company issued a warrant naming a fictitious payee, an indorsement of the name of such fictitious payee for the purpose of cashing the warrant was a forgery.

Error to Wayne; Donovan, J. Submitted April 16, 1908. (Docket No. 95.) Decided May 26, 1908.

Assumpsit by Judson Harmon, receiver of the Pere Marquette Railroad Company, against the Old Detroit National Bank for money had and received. There was judgment for defendant, and plaintiff brings error. Reversed.

Stevens, McPherson & Bills, for appellant.

Henry A. Harmon (*Harrison Geer*, of counsel), for appellee.

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The defendant was one of the general depositaries of the Pere Marquette Railroad Company. The funds on deposit were paid out upon warrants issued by the company. Its method of doing business with the bank will appear from the following statement of facts:

In May, 1905, the railroad company was indebted to the Sunday Creek Coal Company in the sum of $2,097.38. Its purchasing agent prepared a voucher-warrant for payment. This document was prepared on a printed blank. The first page of the document, called the warrant, constituted the check or warrant of the treasurer of the company on the bank. The warrant, as prepared by the purchasing agent, reads as follows:

"PERE MARQUETTE RAILROAD COMPANY
"To the Sunday Creek Coal Co., Dr.
(Pay W. N. Cott, Treas.), Columbus, O.
"Made 5/31/'05 Dept. No. 6706, April.
"For coal per attached statement .....$2,097.38."

Below this were blanks for the signatures of the auditor of disbursements, comptroller, and treasurer, and for the signature of the payee upon presentation at the bank. Above the auditor's signature is the following:

"I certify that this warrant is in accordance with an account approved by the proper officer and duly audited."

Above the comptroller's signature are the words: "Approved for payment." Above the treasurer's signature is the following:

"Will pay this warrant when properly dated and receipted if presented within 60 days from date stamped hereon."

All the above except the receipt of the payee appeared upon a carbon page called the voucher. Instead thereof there were blanks in which to show the manner in which the amount paid should be charged upon the books of the railroad company.

The purchasing agent and his clerk who prepared the papers signed their names upon the voucher, and then

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the original warrant and voucher, with a statement of the coal to be paid for and original invoices thereof attached, were sent to the general manager for his approval. The general manager approved the payment by signing the voucher, and forwarded the papers to the president, who also approved the payment by signing the voucher, and then forwarded the papers to the auditor of disbursements. In the office of the auditor of disbursements, the papers passed through the hands of several clerks, each of whom had some particular duty to perform in relation to them, in verifying the computations, entering the transaction upon the books of the company, etc. Before the warrant had been signed by the auditor of disbursements, Edwin Murdock, one of the clerks in his office, fraudulently took the papers out of the office and sent them to Chicago, where the name and address of the payee named in the voucher was changed from "The Sunday Creek Coal Co., Pay W. N. Cott, Treas., Columbus, O.," to "The G. E. Fairbanks Coal Co., Pay G. E. Fairbanks, Treas., 407 Able Bldg., Cor. 63 St., Stewart Ave., Chicago, Ill.," and the statements attached to the vouchers were changed in the same manner. The altered papers were returned by mail to the office of the auditor of disbursements, where a new warrant was prepared. This new warrant was made payable to "The G. E. Fairbanks Coal Co." to accord with the altered voucher; and when some further entries in relation to the transaction had been made, the papers were, in the regular course of business, laid before the chief clerk of the auditor of disbursements for his approval. The new warrant above mentioned was signed by the auditor of disbursements without any knowledge or suspicion that the name of the payee had been changed after the voucher had been signed by the purchasing agent, general manager, and president of the company. The warrant was then sent to the treasurer of the company, who signed it and mailed it to the payee at Chicago, at the address shown in it.

The indorsement stamped upon the warrant by the dif-

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ferent banks through which it passed indicate that the warrant was cashed by someone at a Denver bank, forwarded by that bank to a bank in Chicago, which forwarded it to the American Exchange National Bank of Detroit, which collected the amount of the warrant from the defendant bank through the Detroit clearing house after an indorsement by the American Exchange National Bank of a guaranty of prior indorsements. This is all the light we have upon the history of the warrant from the time it left the office of the railroad company's treasurer.

The railroad company had no contract with the G. E. Fairbanks Coal Company; never had any dealings with such a company; had never heard of the existence of such a company, and had no coal contract with anyone in Chicago.

The warrant came to the defendant in the usual course of business and was paid. This suit is brought to recover the amount paid on the warrant on the ground that it was a forgery.

The plaintiff requested the court to direct a verdict in his favor. This was refused, and the case submitted to the jury upon the theory that the railroad company was negligent in making and issuing the warrant, and that where one of two parties must suffer, the loss must be borne by the one whose negligence caused it. The jury rendered a verdict of no cause of action.

GRANT, C. J. (*after stating the facts*). The facts in this case are not in dispute, and are sufficiently above stated. The conclusion to be drawn from them is that a trusted employé of the railroad company erased or caused to be erased, with the aid of others, the name of the real payee and the substitution of another payee, and thus caused to be issued a forged warrant or voucher. The payee in the forged instrument was either a fictitious person or a real one unknown to the drawer. The plaintiff made a prima facie case of a fictitious payee. The defendant introduced no evidence that the payee was a real

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entity. The record is barren of any evidence tending to show to whom the payment was made by the bank in Denver, Colorado, or under what circumstances it was paid. All that the record shows is that it was cashed in the Denver bank, and reached the drawee, the defendant, through other banks and was paid by it on July 1, 1905.

As between the depositor and the bank, the burden of proving payment by valid check or other voucher is upon the bank. No citation of authority is needed that he who receives money of another must account for its payment. As between the plaintiff and the defendant, the question is, Upon whom must the loss fall? There is no claim of bad faith on the part of either. The facts being conceded, the question is one of law.

Plaintiff contends that the fraud or negligence of plaintiff's employé does not relieve the bank of its burden of proving that payment was made to the payee named in the warrant. Defendant insists that the officers of the company were negligent in not ascertaining that the voucher was forged; that it exercised due care in honoring it, bearing as it did the genuine signatures of the officers of the company. If the payee named in this voucher, the G. E. Fairbanks Coal Company, Pay G. E. Fairbanks, treasurer, had been presented to the defendant by one claiming to be G. E. Fairbanks, the treasurer of the Fairbanks Coal Company, would the defendant have been protected in payment without any investigation to determine the identity of the presenter with the payee named in the warrant? It seems to us clear that it would not. The same rule must apply when the warrant or check is presented to it, coming through other banks. If the drawee chooses to rely upon the identification by the bank which cashed the check, it does so at its own risk, and its recourse is upon that or some intermediate bank. If the G. E. Fairbanks Coal Company was a fictitious payee the bank cannot defend under the statute (2 Comp. Laws, § 4870) that the check was payable to bearer. That statute applies only to cases where the drawer knowingly

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draws the check to the order of a fictitious payee. *Armstrong* v. *National Bank*, 46 Ohio St. 512; *Shipman* v. *Bank of New York*, 126 N. Y. 318; *Hatton* v. *Holmes*, 97 Cal. 208; *Chism, Churchill & Co.* v. *National Bank*, 96 Tenn. 649; *Murphy* v. *National Bank*, 191 Mass. 159; 2 Bolles on Modern Law of Banking, p. 716; 7 Cyc. p. 564.

In *Shipman* v. *Bank of New York*, it is said:

"We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person," citing authorities.

There are authorities to the contrary in this country, but the clear weight of authority in both England and the United States is in favor of this rule. If this warrant had been changed so as to make it a forged instrument after it had been issued by the railroad company, under all the authorities the defendant would not have been justified in paying the forged instrument. The time and place of the forgery are immaterial, unless the forgery was committed under such circumstances as to show negligence on the part of the drawer. But the drawee's duty to use due diligence in identifying the payee of the check or warrant is not changed by the time and place of the forgery. This is not the case of *U. S.* v. *Exchange Bank*, 45 Fed. 163. In that case the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check. In that case the fault was, of course, with the drawer and not with the drawee. To render that case applicable to this, it should have appeared that the proper officer of the railroad company went to the bank and identified the payee.

It was held in *Robarts* v. *Tucker*, 16 Q. B. 560:

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"That a banker cannot debit his customer with the payment made to one who claims, through a forged indorsement and so cannot give a valid discharge for the bill; unless there be circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position, so as to preclude the customer from showing it to be forged."

It is held in *Murphy* v. *National Bank*, supra:

"The ordinary rule is well established that a banker, on whom a check is drawn, must ascertain at his peril the identity of the person named in it as payee. It is only when he is misled by some negligence or other fault of the drawer, that he can set up his own mistake in this particular against the drawer," citing authorities.

In this case the defendant took no precautions before paying the warrant to ascertain the identity of the payee. It did not show that it paid the warrant to the payee named therein. It evidently relied upon the identification made by the bank in Denver, Colorado, where the warrant was cashed, and whether that bank took the requisite precaution we do not know. It would naturally excite suspicion that, a check, drawn in Detroit, payable to a corporation in Chicago, on a bank in Detroit, should be presented to a bank in the distant city of Denver. It was clearly the duty of the Denver bank to take proper means to assure itself that it was paid to the proper party; in other words, to take proper means to identify the payee. 2 Morse on Banks and Banking (4th Ed.), § 466 (*b*); *Ellis & Morton* v. *Trust Co.*, 4 Ohio St. 628. The court in that case said:

"Where negligence reaches beyond the holder and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot, in negligent disregard of this duty, retain the money received upon a forged instrument."

The negligence of the Denver bank is imputable to the defendant.

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In *Graves* v. *American Exchange Bank*, 17 N. Y. 205, a draft was sent payable to order of Charles F. Graves. It reached a person in the same place by the same name, and by him was indorsed and paid by the drawee. It was held that the payment, although made in good faith, did not divest or impair the title to the true owner who had not seen or indorsed the paper. It was held in fact to be a forged indorsement.

It was held in *Third Nat. Bank* v. *Merchants' Nat. Bank*, 76 Hun (N. Y.), 475, that it is the signature of the payee that transfers title to a check; that the signature of another person by the same name as the one to whom it was drawn, is just as much a forgery as if the names had been different. It is the signature of the payee that transfers title to the check. A similar holding is in *Indiana Nat. Bank* v. *Holtsclaw*, 98 Ind. 85.

It was held in *First Nat. Bank of Chicago* v. *Pease*, 168 Ill. 40, that the fact that the drawer of a check delivers it to a party representing himself as the payee's agent, without investigating the alleged agent's authority, is not such negligence as will relieve the bank from liability for the payment of the check on a forged indorsement of the payee's name by the alleged agent.

If the payee named in the paid warrant was a fictitious person, the indorsement in the name of such fictitious party is in effect a forgery. *Hatton* v. *Holmes*, supra. If the G. E. Fairbanks Coal Company, and G. E. Fairbanks, treasurer, were fictitious parties, the indorsement was a forgery. If they were real parties the indorsement by any other without authority would be a forged indorsement and would not excuse defendant's payment. It was incumbent upon it to show the existence or nonexistence of such a payee, and that the Denver bank took the proper means to identify the payee. It failed to sustain this burden, and therefore the verdict and judgment are set aside and a new trial ordered.

BLAIR, MONTGOMERY, CARPENTER, and MCALVAY, JJ., concurred.

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WEIDMAN *v.* WILLSON.

PLEADING—DECLARATION—ASSUMPSIT—WAIVING TORT—TRESPASS.

A declaration on the common counts in assumpsit, counting specially for the use of water used by defendant on plaintiff's premises and metered through plaintiff's meter, will not support a recovery on the theory that the entry upon plaintiff's premises by defendant constituted a trespass for which, under section 11207, 3 Comp. Laws, plaintiff was entitled to recover in assumpsit, the statute not being referred to and counted upon, nor the fact of the trespass alleged, in the declaration.

Error to Shiawassee; Miner, J. Submitted April 16, 1908. (Docket No. 97.) Decided May 26, 1908.

Assumpsit by Frank Weidman against Purvis S. Willson for goods sold and delivered. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Watson & Chapman, for appellant.

George Pardee, for appellee.

MONTGOMERY, J. This action originated in justice's court. The declaration was on the common counts in assumpsit and specifically for the use of water in the building now occupied by defendant. The defendant recovered in the justice's court, the plaintiff appealed to the circuit court, and on the trial of the case, at the conclusion of the testimony, the circuit judge directed a verdict for the defendant. The plaintiff brings error.

It appeared on the trial that the defendant had the right to possession of certain rooms in a building, the occupancy of other portions of which were in the plaintiff, and that defendant was accustomed to go into other portions of the building and use water which belonged to the plaintiff, and which was metered through his meter. It also ap-

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peared beyond dispute that the defendant was using this water under a claim of right, and that the circumstances were such as to repel any implication of a promise to pay. The circuit judge was of the opinion that plaintiff had not the right to waive the tort and sue in assumpsit, resting his decision on numerous decisions of this court, including *Watson* v. *Stever*, 25 Mich. 386; *Grinnell* v. *Anderson*, 122 Mich. 533; *Tuttle* v. *Campbell*, 74 Mich. 662.

In this court the defendant's brief was first filed. The plaintiff now claims in his brief a right to recover, on the ground that the entry by defendant through the plaintiff's building into the basement, where he made use of the water from the hydrant, constituted a trespass upon land, for which, under section 11207, 3 Comp. Laws, plaintiff was entitled to recover in assumpsit. It is by no means clear that this position was brought to the attention of the circuit court, and it is a sufficient answer to say that the declaration being on the common counts, the statute not being referred to and counted upon, nor the fact of the trespass alleged, in the declaration, the plaintiff is not entitled to recover on this theory. See *Anderson Carriage Co.* v. *Pungs*, 134 Mich. 79; *Barbour* v. *Hurlburt*, 137 Mich. 534.

The judgment is affirmed.

GRANT, C. J., and BLAIR, CARPENTER and MCALVAY. JJ., concurred.

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PECARD *v.* MENOMINEE RIVER SUGAR CO.

1. MASTER AND SERVANT — PERSONAL INJURIES — NEGLIGENCE OF MASTER — FAILURE TO PROMULGATE RULES — QUESTION FOR JURY.

   In an action by a servant against a beet sugar manufacturing company for injuries resulting from his being pinched between cars he was coupling, by reason of another car being pushed against them by other servants of defendant, evidence examined, and *held*, under the circumstances, a question for the jury whether defendant was not guilty of actionable wrong in failing to provide for some warning of the danger from the approaching car to be given to one occupying the position occupied by plaintiff.

2. SAME — ASSUMPTION OF RISK — KNOWLEDGE OF CONDUCT OF BUSINESS.

   A servant who had no knowledge of the failure of the master to make rules governing the conduct of employés in moving cars about its yard, or to provide any warning to workmen engaged at a point where the moving of cars without warning would be likely to occasion injury, but on the contrary was unfamiliar with the master's methods, and had no thought that an absence of any regulations on the subject would result in a car being pushed without warning against a car to which he was coupling another, did not assume the risk of injury from that source.

3. SAME—DANGEROUS EMPLOYMENT—PROMULGATION OF RULES—DUTY OF MASTER.

   In a business conducted by many employés performing work independently of each other, and in which the work of one becomes periodically dangerous to another, it is the duty of the master to provide reasonable precautions against such danger, and amongst these is promulgating rules and regulations for the giving of warning to the persons likely to be endangered when such dangerous acts are about to be performed.

4. SAME—CONTRIBUTORY NEGLIGENCE.

   A servant ordered by his foreman to couple a standing car to one being moved against it was not negligent in taking his position between the cars for that purpose so as to defeat his

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recovery for an injury caused by another car being pushed without warning against the standing car from the opposite direction.

Error to Menominee; Stone, J. Submitted April 16, 1908. (Docket No. 101.) Decided May 26, 1908.

Case by Adolph Pecard against the Menominee River Sugar Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

L. D. Eastman (*E. C. Eastman*, of counsel), for appellant.

Doyle & Tracy, for appellee.

MONTGOMERY, J. The defendant was engaged in the business of manufacturing sugar from sugar beets. On its premises was situated a beet shed into which were run railway tracks upon which loaded cars were taken in and the beets unloaded, and the testimony shows that as occasion required, the empty cars were taken out by the switch engine, or if the switch engine was not at hand, the cars were pushed out by the men employed in unloading beets. The plaintiff was employed by the defendant to engage in the work of unloading beets on the 16th day of October, 1906. He commenced work at about 1 o'clock on that day, his work consisting of shoveling beets from a loaded car into one of the bins. He again worked on the 17th, his work being likewise confined to unloading beets. He testified that during this time the only cars that he saw moved were moved by the switch engine, and that he did not know anything as to the rules and regulations of the company in the management of its business or of its cars, or how the cars should be operated. On the morning of the 18th, he went to work at 7 o'clock. Shortly after that time he was called out by the foreman, whose duties included those of a yardmaster, and directed to throw the beets which had fallen over onto the track up into the shed. He was engaged in this business but a few

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moments when he was called by the foreman, Mr. Morrow,—there being at the time two cars standing on the tracks at a considerable distance outside the shed, one of which was a dead car and the other of which was being propelled by the men pushing it towards the dead car,—and directed to open the coupling on the stationary car. Plaintiff crossed over the track and saw that the coupling was closed on the stationary car and on the approaching car was open, and he thought they were in fit condition to make a coupling. But he was again told to open the coupling. The cars came together and bounded back, leaving a space of about four inches between them. Plaintiff then went in beside the dead car for the purpose of making the coupling. While he was thus occupied, other employés pushed from the direction of the shed against the dead car another car by hand, causing the dead car to move and come in contact with the other approaching car, caught plaintiff's arm and so injured it as to necessitate amputation.

The case was tried before a jury, and upon a charge which left them to determine whether the plaintiff was called outside the line of his employment without proper instruction as to the danger of the same, and second as to whether the defendant was guilty of negligence in not having provided rules or regulations for the government of its business which should prevent such an occurrence as that in question, the jury found a verdict in favor of the plaintiff.

The sole error assigned is that the court erred in refusing to instruct the jury to find a verdict for the defendant as requested by counsel for the defendant, and we are only concerned in determining whether there was a case to go to the jury on any theory within the pleadings.

The evidence indicates that no rules or regulations were made to govern the conduct of the defendant's employés in this business, or to provide any warning to workmen engaged at a point where the moving of these cars without warning would be likely to occasion injury.

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It further shows that the plaintiff had no knowledge of the failure of the company to make such provision. The foreman testified, it is true, that there was not anyone who had authority to order the special car in question pushed out so as to bump into that car. But he also testified that he had—

"Given orders to McGowan to push some of the cars out to clean the tracks; that is the only order. That order did not refer to any particular car, or to any particular moment. That simply referred to clearing that track of empty cars for cleaning purposes. By that, I mean cleaning up the beets off the track."

We think it was a question for the jury as to whether the defendant was guilty of actionable wrong in failing to provide, under these circumstances, for some warning of the danger from the approaching car to be given to one occupying the position which this plaintiff did. It is not a case where a plaintiff, with full knowledge of the methods of the defendant, had assumed the risk. On the contrary, he was unfamiliar with those methods, and had no thought that an absence of any regulation on the subject would result in such reckless conduct as to push this car against the dead car at which he was lawfully stationed.

The case is very similar in its facts to that of *Polaski* v. *Pittsburgh Coal Dock Co.* (Wis.), 114 N. W. 437. In that case it was necessary for certain workmen employed on the dock of the defendant to pass over and across a railroad track upon which it was the custom of the defendant to move cars by hand, which was usually done by attaching a hook to either the front or the rear of the car and propelling it in this way. The plaintiff had been ordered to cross the track to the opposite side of the dock, and, while crossing, was struck by a car propelled from the rear by one of the defendant's workmen and injured. The evidence showed that no rule had been promulgated for governing defendant's servants in the manner of running these cars, and the court said:

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"In a business conducted by many employés performing work independently of each other, and in which the work of one becomes periodically dangerous to another, it is the duty of the master to provide reasonable precautions against such danger, and amongst these is promulgating rules and regulations for the giving of warning to the persons likely to be endangered when such dangerous acts are about to be performed."

The case of *Gavigan* v. *Railway Co.*, 110 Mich. 71, is distinguishable for the reason that it does not appear that there was any neglect of a duty to promulgate proper regulations governing the conduct of the business.

It is contended that the plaintiff was guilty of contributory negligence in placing himself between these two cars. The answer to this is obvious. If there was any negligence on the part of the defendant at all, it was a negligence wholly disconnected with the act which the plaintiff was engaged in performing. For all that appears in this record, he could perform the duties which he undertook to do from between the cars where he placed himself with perfect safety except for the intervening and unexpected propulsion of this additional car against the dead car before which he was standing. It was not contributory negligence to fail to anticipate this.

We think there was a case for the jury, and judgment will be affirmed.

GRANT, C. J., and BLAIR, CARPENTER, and MCALVAY, JJ., concurred.

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WILLIAMS v. CRANE.

1. ASSUMPSIT—ACTION—GROUNDS—COMMON COUNTS.
Recovery may be had by a servant, under the common counts in assumpsit, for the value of services performed, subject to a deduction for failure of plaintiff to perform his contract, where he left the service before completion of the contract period.

2. MASTER AND SERVANT — ACTION FOR WAGES — BURDEN OF PROOF.
Where the services of a servant are accepted by the master, and action is brought to recover their value, the burden is not upon the servant of proving faithfulness, but the burden of proving the contrary is upon the master.

3. SAME—EVIDENCE—FIDELITY OF SERVANT—SUFFICIENCY.
Evidence that a servant employed to conduct a farm sold some of the crops and applied the proceeds upon his own claim for services, it being inferable that both parties intended that course to be pursued, and that there were some items for which credit was not given until attention was called to them, do not justify the court in saying as a matter of law that the servant was lacking in fidelity.

4. SAME—ACTION FOR WAGES—DAMAGES.
After entering upon performance of a contract under which plaintiff was to work defendant's farm for a share of the crops, the parties abandoned the contract and agreed that the relation between them should be that of master and servant, the term of service to begin at the time the tenancy began. Before the change in their contract relations plaintiff did some work for other people, for which he received pay, but no loss occurred to defendant in consequence of plaintiff's absence while working for others. In an action by plaintiff to recover the value of his services, *held*, that defendant could not have credit for the money earned by plaintiff, but that he could not be charged with plaintiff's time while earning it.

5. SAME—VALUE OF SERVICES—EVIDENCE.
Where defendant testified that plaintiff's compensation for running his farm was to depend upon the good results ob-

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tained, he could not complain that plaintiff introduced testimony to show the value of the crops produced under his management.

Error to Lenawee; Chester, J. Submitted May 4, 1908. (Docket No. 83.) Decided May 26, 1908.

Assumpsit by James M. Williams against Arthur P. Crane for work and labor. There was judgment for plaintiff, and defendant brings error. Affirmed.

Smith, Baldwin & Alexander, for appellant.

John L. O'Mealey (*Bird & Sampson*, of counsel), for appellee.

Defendant, a resident of the city of Adrian in this State, owns a farm located several miles distant. Plaintiff became defendant's tenant on this farm April 1, 1903, under an arrangement whereby each was to have a share of the crops raised and sold. In Augnst of that year it was agreed that their relation should be that of master and servant instead of landlord and tenant, and that this relation should date back to April 1, 1903. No stated wages were agreed upon. Defendant testifies that plaintiff's wages should depend "upon the good results obtained," while plaintiff testified that defendant said: "I will guarantee I will satisfy you." Under this arrangement the farm was carried on by plaintiff. He harvested the crops, marketed a portion thereof, used part of the proceeds in paying the expenses and applied the balance upon his claim for wages. Plaintiff testifies that in December he went to defendant's house—

"In Adrian and asked him what he had made up his mind as to what the value of the work was worth, and he said he didn't have time to talk with me that day. I said that I would like to know because it was getting along to the end of the year and if I could agree on a price I just as soon work for him in the future as anybody. I saw him next in February and asked him if he was ready to

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settle up. * * * I was not able to see him between the time in December and sometime along in February. I said it is drawing now toward spring and I want to know whether I am going to stay or not, if I am not I want to know it; I want to know what I am going to get out of my summer's work and be in shape to take another farm. He said he didn't have time to take it up that day. * * * I told him I was going to move by the first of March and I wanted someone there to take my place. * * * He said there were some things there he did not understand, and some day when we got together he would look it over with me. But that day never came. * * * I told him I would give him until the 10th of March to get someone there to take my place. * * * I remained on the farm until the 10th of March" and on that day he left.

In May he brought this suit declaring upon the common counts in assumpsit, furnishing a bill of particulars and recovered a verdict and judgment for the reasonable worth of his services. Defendant seeks a reversal on various grounds, which will be discussed in this opinion.

CARPENTER, J. (*after stating the facts*). 1. The first question for consideration arises from the contention of defendant's counsel that recovery should not have been permitted upon the common counts in assumpsit. We do not think this question a doubtful one. Under the testimony in this case, plaintiff had performed certain services for defendant for which he was entitled to be paid money. Even if it were true, as defendant contends, that plaintiff was bound to stay until April 1, 1904, he would none the less be entitled to recover, subject to a deduction for failure to perform his contract, and this recovery could be had under the common counts in assumpsit. *Allen* v. *McKibbin*, 5 Mich. 449; *Bush* v. *Brooks*, 70 Mich. 446.

2. It is insisted that plaintiff could not recover because he did not perform the burden resting upon him of proving that he was a faithful servant. Indeed, it is urged that his testimony respecting the sale of the crops and the application of a portion of the proceeds upon his own

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claim proves his lack of fidelity. It is not true that there rested upon plaintiff the burden of proving fidelity. When the services of a servant are accepted and received, as in this case, the burden of proving the contrary rests upon his employer. Nor can it be said in this case that the testimony of plaintiff negatived his fidelity to his employer. The sale of the crops and the application of the proceeds were, under the circumstances disclosed by this record, presumably in accordance with the contract of employment. It is to be inferred that both parties intended that course to be pursued.

The point is also made that there were some items which plaintiff improperly failed to credit to defendant. When these were brought to his attention, plaintiff admitted his error and said they should be credited. This does not justify our saying as a matter of law that plaintiff was lacking in fidelity.

3. Before the altered relations between the parties to this suit, plaintiff had done some work for other people, for which he was paid a certain amount of money. Defendant insisted that he should have credit for this money. The trial court denied this and held that defendant should not be charged with plaintiff's time while he was earning this money. It does not appear from the testimony that any loss occurred to defendant in consequence of plaintiff's absence while working for others. Under these circumstances, we think the rule applied by the trial judge the correct rule.

4. Plaintiff was asked this question:

"Have you made an estimate as to what had been sold off the farm during the year that you were there, and the value of what remained to be sold as the products of the farm, what it would yield for that year, and as to how much it would amount to?"

Defendant objected, upon the ground that this was immaterial and incompetent, and the witness answered, "something over $1,600." We do not think the ruling of the trial court erroneous. If the jury had believed

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defendant they would have had occasion to use this testimony, for, according to defendant, plaintiff's compensation depended upon the good results produced. Defendant cannot complain because plaintiff introduced testimony which would be needed in the event of his being credited as a witness.

Other complaints are made, but they disclose no reversible error, and their discussion would be of no service to the parties or to the legal profession.

The judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

CHURCHILL v. COMMON COUNCIL OF CITY OF DETROIT.

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INTOXICATING LIQUORS—REGULATION OF TRAFFIC—DETROIT CHARTER—POWER OF MUNICIPALITY—RESTRICTED DISTRICT.

Under the authority granted by its charter (sections 184, 186) to license and regulate the sale of intoxicating liquors, the common council of the city of Detroit has authority to enact an ordinance establishing limits beyond which saloons shall not be allowed.

Certiorari to Wayne; Hosmer, Brooke, Rohnert, Donovan, and Mandell, JJ. Submitted May 5, 1908. (Calendar No. 22,516.) Decided May 26, 1908.

Mandamus by John W. Churchill to compel the common council of Detroit to approve a liquor bond. There was an order denying the writ, and relator brings certiorari. Affirmed.

Alex. J. Groesbeck, for relator.

P. J. M. Hally, for respondent.

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MOORE, J. The relator, desiring to engage in the saloon business at 772 Porter street in the city of Detroit, filed his bond in due form. The common council rejected the bond because it provides for the establishment of a saloon in the restricted district defined in an ordinance passed on the 20th day of July, 1907, wherein the common council prescribed where saloons in which spirituous, intoxicating, or malt liquors are sold as a beverage might not be located. Relator applied to the circuit court for a writ of mandamus to compel the common council to approve his bond. The court denied his petition. Certiorari is brought to review that action.

The only authority of the city of Detroit to pass the ordinance is found in sections 184 and 186 of the charter, the material portions of which are as follows:

"SECTION 184. The said council shall have power * * * to license and regulate the selling or giving away of any ardent spirits, or any other intoxicating liquors by any shopkeeper, trader, grocer, inn, hotel or tavern keeper, keeper of any ordinary, saloon, recess, victualing or other house, or by any other person, in case the selling or giving away of ardent spirits or other intoxicating liquors and licensing the sale thereof, shall hereafter be authorized by the law of the State.

"SECTION 186. The common council shall have power to license and regulate the keepers of hotels, taverns and other public houses, grocers and keepers of ordinaries, saloons, victualing or other house or place for furnishing meals, food or drink."

There is no express provision of the charter giving the city power to regulate and prescribe the location of saloons or places where intoxicating liquors are sold or given away, nor is there any provision expressly giving the common council the power to suppress saloons. It is claimed that, as the charter does not in express terms give the right to establish the location of saloons, the action of the common council in establishing saloon limits is void. Counsel cites, in support of this contention, *Timm* v. *Common Council of Caledonia Station*, 149 Mich. 323, and

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claims that the reasoning contained in the opinion supports this contention. That case is easily distinguishable from the case at bar. In the charter of the village of Caledonia Station, there was no power conferred to regulate the traffic. In the charter of Detroit the power to regulate is conferred upon the common council.

The power to regulate has been defined as meaning:

"To adjust by rule, method or established mode; to direct by rule or restriction; to subject to governing principles or laws. The term is one of broad import. A power to regulate does not properly include a power to suppress or prohibit, for the very essence of regulation is the existence of something to be regulated. But the power to regulate a business, trade, etc., authorizes a municipality to confine the exercise of such business to certain localities, to certain hours of the day, etc." 24 Am. & Eng. Enc. Law (2d Ed.), p. 243.

See, also, cases cited in the note.

We think the case within *People* v. *Blom*, 120 Mich. 45, and the many cases therein cited. See, also, *Love* v. *Judge of Recorder's Court*, 128 Mich. 545.

The judgment is affirmed.

OSTRANDER, HOOKER, CARPENTER, and MCALVAY, JJ., concurred.

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DANIELS *v.* BAY CITY TRACTION & ELECTRIC CO.

1. APPEAL AND ERROR—REVIEW—QUESTIONS CONSIDERED—RELIEF PRAYED.

   The court will not enter into a doubtful legal question involved in a case where the plaintiff in error requests that, unless the case can be reversed and no new trial granted, it be affirmed, and the case is not one in which the court would deny a new trial.

2. SAME—NEW TRIAL—NECESSITY.

   On error to review a judgment against a street-railroad company for injuries to the driver of a vehicle, the court will not deny a new trial on reversing the judgment, where it is inferable from the record that on retrial plaintiff might establish a custom on the part of the defendant to stop its cars and permit drivers, situated as was plaintiff, to cross its tracks in safety, and that he relied upon such custom, thereby relieving himself from contributory negligence.

Error to Bay; Collins, J. Submitted May 6, 1908. (Docket No. 107.) Decided May 26, 1908.

Case by William H. Daniels against the Bay City Traction & Electric Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Weadock & Duffy, for appellant.

John Brigham (*De Vere Hall*, of counsel), for appellee.

CARPENTER, J. For a statement of this case see 143 Mich. 493. There we reversed a judgment in favor of the plaintiff, and ordered a new trial. It has been retried and a verdict of $500 rendered in plaintiff's favor. Defendant brings the case here for review. The case made by plaintiff upon the second trial is not materially different from

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that shown by the former record. In a legal sense it is certainly no weaker. Defendant's counsel has taken an unusual course. He asks us to reverse the judgment without granting a new trial, and says that unless we take that course that he requests the judgment to be affirmed. In view of this request, we are not justified in entering into a consideration of the doubtful legal question involved—a question upon which the Justices who sat on the former hearing of this case differed. For whatever might be our conclusion respecting that question, we are bound to say that this is not one of those unusual cases where we would decline to grant a new trial.

In this connection it should be stated that, from this record, it may be inferred that on a new trial plaintiff may establish a custom on the part of the railway company to stop its cars and permit drivers of vehicles, situated as was plaintiff, to cross its tracks in safety. He ought not to be deprived of the right of establishing this, as he would be by denying a new trial, and of contending that because he relied upon this custom (see *Detroit, etc., R. Co.* v. *Van Steinburg*, 17 Mich. 99) that he was not guilty of contributory negligence.

The judgment is affirmed.

GRANT, C. J., and BLAIR, MONTGOMERY, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

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PEOPLE *v.* CASE.

1. INTOXICATING LIQUORS—REGULATION—MUNICIPAL ORDINANCE—EXCLUSION OF FEMALES—VALIDITY—CONSTITUTIONAL LAW.

   A municipal ordinance to "restrain, license and regulate saloons," etc., which provides that "no person licensed under this ordinance shall harbor or employ any females in or about his or her place of business, or permit females to resort to his or her place of business for the purpose of drinking," is not invalid as an unwarranted discrimination against females and an infringement of their rights, privileges, and immunities, granted by the Constitution, but is a valid exercise of the police power.[1]

2. SAME—ORDINANCE—VALIDITY—FLINT CHARTER.

   The charter of the city of Flint (Act No. 420, Local Acts 1905), by section 10 of chapter 15 of which power is conferred upon the common council to prevent vice and immorality, and to restrain, license and regulate saloons and other places where intoxicating liquors are sold, authorizes an ordinance prohibiting women from resorting to places where liquors are sold for the purpose of drinking.

Exceptions before judgment from Genesee; Wisner, J. Submitted May 7, 1908. (Docket No. 124.) Decided May 26, 1908.

Edgar D. Case was convicted of the violation of an ordinance. Affirmed.

Johnson & Landon (*Rundell & Stockton*, of counsel), for appellant.

John H. Farley, City Attorney, for the people.

MOORE, J. Respondent was arrested on a warrant, the charge contained therein being for a violation of an ordinance of the city of Flint entitled:

[1] As to constitutionality of police regulations excluding women from places of business, see note to *Gastineau* v. *Com.* (Ky.), 49 L. R. A. 111.

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"An ordinance to restrain, license and regulate saloons and other places where intoxicating liquors are sold, and prescribe the location thereof."

The particular section of the ordinance of which a violation by respondent was charged reads as follows:

"SECTION 5. No person licensed under this ordinance shall harbor or employ any females in or about his or her place of business, or permit females to resort to his or her place of business for the purpose of drinking."

The cause was tried before the circuit judge, without a jury, and upon the trial it was conceded that the charge contained in the complaint and warrant correctly charged a violation of the ordinance, and that such ordinance was duly adopted and in force at the time of the commission of the act charged. It was conceded that on the 15th day of June, 1907, the respondent, being a duly licensed saloon keeper under such ordinance and engaged in the business of selling and keeping for sale intoxicating liquors, permitted certain women to resort to his place of business for the purpose of drinking, contrary to the terms of said ordinance, and the only question left for the determination of the circuit judge was whether section 5 of the ordinance is valid under the Constitution and laws of the State of Michigan.

The court found the ordinance was a valid exercise of the police power and that the respondent was guilty. A judgment was duly entered on such conviction and sentence thereunder was deferred until respondent should have an opportunity to review the action of the circuit court.

The question is whether the ordinance, and particularly section 5, under which respondent was convicted, is in contravention of the Constitution and laws of the State of Michigan.

The theory of counsel for respondent, and upon which the principal contention seems to be based, is that the ordinance in question is an unwarranted discrimination

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against the rights of females, that women are granted equal rights, privileges and immunities by the Constitution; and that the ordinance in question is an infringement on these constitutional rights, and therefore void. Also that the provisions of the special charter of the city of Flint are not sufficiently broad to warrant the enactment of section 5 of the ordinance, in that it provides a vending of liquors contrary to the provisions of the State law.

This ordinance was before this court in *Wells* v. *Torrey*, 144 Mich. 689. It will be helpful to refer to the opinion in that case.

The charter of Flint (Act No. 420, Local Acts 1905, chap. 15) contains the following provisions: The first subdivision of section 10 is as follows:

"To prevent vice and immorality, to preserve public peace and good order, to organize, maintain and regulate a police force of the city, to prevent and quell riots, disturbances and disorderly assemblies, to protect the property of the corporation, and of its inhabitants, and of any association, public or private corporation, or congregation therein, and to punish for injuries thereto, or for unlawful interference therewith."

The fourth subdivision is as follows:

"To prohibit the selling or giving of any spirituous, fermented, or intoxicating liquors to any drunkard or intemperate person, or any minor or apprentice."

The fifteenth subdivision is as follows:

"To restrain and punish drunkards, vagrants, street beggars and other disorderly persons."

The thirty-seventh:

"To restrain, license and regulate saloons and other places where intoxicating, or spirituous liquors or malt, brewed, fermented, spirituous, or vinous liquors are sold or to be sold, and to regulate and prescribe the location thereof; to forbid and prevent the vending or other disposition of any intoxicating liquors in violation of the laws of the State."

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The forty-first (forty-third in the revision of 1903 and forty-fourth in the revision of 1905), so far as it concerns this inquiry, is as follows:

"And further, they shall have authority to enact all ordinances, and to make all such regulations consistent with the laws and Constitution of this State, as they shall deem necessary for the safety, order and good government of the city, and the general welfare of the inhabitants thereof."

It will be observed that very broad police powers are conferred upon the common council, one of which is to prevent vice and immorality, another of which is to restrain, license, and regulate saloons and other places where intoxicating liquors are sold.

We have had occasion to construe a charter conferring the right to regulate the business of selling intoxicating liquors in the case of *Churchill* v. *Common Council of Detroit*, ante, 93. It is not necessary to repeat what was said in the opinion in that case, but reference is made thereto.

In the recent case of *Muller* v. *Oregon* (U. S.), 28 Sup. Ct. 324, there is an interesting discussion germane to the principles involved here. The legislature of Oregon passed a law limiting the hours of labor of women employed in laundries to ten hours daily. The law was attacked as unconstitutional, one of the reasons being that it was class legislation because it applied only to women. The supreme court held, thereby sustaining the State court, that the law was not unconstitutional.

In *Ex parte Hayes*, 98 Cal. 555 (20 L. R. A. 701), the court construed an ordinance prohibiting the sale of liquors in places where females attend as waitresses. In disposing of the case the court said in part:

"The fundamental principles which underlie and support legislation of this character were announced by this court in *Ex parte Christensen*, 85 Cal. 208, and also received an exhaustive discussion by the Supreme Court of the United States in the case of *Crowley* v. *Christensen*,

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137 U. S. 86; and upon the authority of those cases we hold that the ordinance under consideration here is a valid exercise of the power conferred by section 11 of article 11 of the constitution of this State upon counties, cities, and towns to make 'all such local police, sanitary, and other regulations as are not in conflict with general laws.'

"It is claimed, however, by the counsel for the petitioner that the ordinance makes a discrimination against women in the matter of employment, and is therefore in conflict with section 18 of article 20 of the constitution of this State, which is in these words:

"'No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession.'

"This section does not, in our opinion, operate as a limitation upon the power of the State or its municipalities to prescribe the conditions upon which the business of retailing intoxicating liquors shall be permitted to be carried on, or in regulating the manner in which such business shall be conducted."

In *Adams* v. *Cronin*, 63 L. R. A. 61 (29 Colo. 488), in disposing of the case the following language was used:

"If a discrimination is made against women solely on account of their sex, it would not be good; but if it is because of the immorality that would be likely to result if the regulation was not made, the regulation would be sustained. That injury to public morality would ensue if women were permitted without restrictions to frequent wine rooms, there to be supplied with liquor, is so apparent to the average person that argument to establish so plain a proposition is unnecessary. But if some people might not be willing to concede this, it is enough to say that the general assembly, speaking through the city council, with whom the decision entirely rests, has so determined. Women, therefore, may properly be excluded from wine rooms, as this ordinance provides; and if they have no constitutional right to insist upon being admitted to places there to be supplied with liquor when the effect would be demoralizing to society, a fortiori the saloon keeper may be prevented from furnishing them facilities for contributing to that result. * * *

"This ordinance does not operate as a discrimination between different licensees. It applies equally to every

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one of that class, and the fact that it restricts the classes or persons to whom sales may be made in certain places or localities does not make it invalid. All courts can readily see that the restrictions therein found and the classification made with respect to the persons permitted to frequent wine rooms for supplying themselves there with liquor are based upon reasons that have their seat in the facts of nature, and that such regulations are conducive to, and are reasonably adapted to secure, the worthy object of preserving public morality."

Counsel for respondent cites the case of *Gastineau* v. *Commonwealth*, 49 L. R. A. 111 (108 Ky. 473). A reference to the case will show it to be easily distinguishable from the case at bar. In the footnotes to the case there is a collection of cases showing that the great weight of authority is in favor of the doctrine that ordinances of this character are within the police powers.

Judgment is affirmed, and the case will be remanded for further proceedings.

OSTRANDER, HOOKER, CARPENTER, and MCALVAY, JJ., concurred.

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TOWNSHIP OF STAMBAUGH *v.* IRON COUNTY TREASURER.

1. TOWNSHIPS—CHANGE OF BOUNDARIES—UNCOLLECTED TAXES—DISTRIBUTION—AUTHORITY OF TOWNSHIP TREASURER.

   By Acts Nos. 577, 578, and 667, Local Acts 1905, by which certain territory was detached from the township of Iron River, in Iron county, and attached to the township of Stambaugh, the township of Atkinson disorganized and its territory attached to the township of Iron River, and the territory detached from Iron River detached from the school district known as the "Public Schools of Iron River" and attached to the "Public Schools of Stambaugh," the legislature intended to change the territorial boundaries of the townships of Iron River and Stambaugh and of the school districts in and coextensive with each, and to provide for the distribution of all uncollected taxes of all territory affected by the legislation; and the provisions in said Acts Nos. 577 and 578 empowering the treasurers of the townships of Iron River and Stambaugh to collect taxes due and unpaid, and to enforce the payment of delinquent taxes, and credit them to their respective townships, entitles said treasurers to receive from the county treasurer the delinquent taxes levied for township and school purposes upon property in said territory afterward collected by the auditor general and paid over to the county treasurer.

2. SAME—POWER OF LEGISLATURE.

   The legislature has authority to empower the township treasurer to receive all moneys belonging to the township treasury, and to take the necessary steps to obtain them.

3. STATUTES—CONSTRUCTION—MANIFEST INTENT—LITERAL SENSE.

   In the construction of a statute the manifest intent of the legislature must prevail over the literal sense of the terms used.

4. TOWNSHIPS—CHANGE OF BOUNDARIES—UNCOLLECTED TAXES—VESTED RIGHTS.

   A township does not acquire a vested right in delinquent taxes levied for township purposes in its territory and returned unpaid so that the legislature cannot, upon detaching a portion of its territory, transfer the right of collecting such taxes to the township to which the territory is transferred.

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5. STATUTES—SUBJECT AND TITLE—HARMONY.

The title of Act No. 578, Local Acts 1905, providing for the detaching of certain territory from one township and attaching it to another, disclosing that intention, is broad enough to include a provision for the distribution of uncollected taxes in the detached territory.

Certiorari to Iron; Stone, J. Submitted May 12, 1908. (Calendar No. 22,780.) Decided May 26, 1908.

Mandamus by the township of Stambaugh to compel the treasurer of Iron county to pay over certain taxes collected for township and school purposes. There was an order granting the writ. and respondent brings certiorari. Affirmed.

M. H. Moriarty and *Clarence D. Dwyer*, for relator.

Fred H. Abbott, for respondent.

The legislature of 1905 passed Local Act No. 578, entitled:

"An act to detach certain territory from the township of Iron River, in the county of Iron, and attach the said territory to the township of Stambaugh, in said county."

The act consists of two sections, the first of which detaches townships 44 and 45 north, of range 37 west, from the township of Iron River, and attaches the same to the township of Stambaugh, in said county. The second section provides that the township treasurer is—

"Empowered and authorized to collect all taxes that may be due and unpaid at or before the date of the taking effect hereof, upon any property detached from the township of Iron River and attached to the township of Stambaugh, as described in section one of this act. And to enforce the payment of delinquent and other taxes in the same manner as other delinquent taxes are collected in said township under the general laws. And to credit all moneys thus collected to the township of Stambaugh."

At the same time the legislature passed Local Act No. 577, disorganizing and vacating the township of At-

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kinson in said county of Iron, and incorporating its territory with the adjoining township of Iron River. Section 4 of that act provides for the enforcement and payment of delinquent and other taxes and for crediting them, when collected, to the township of Iron River in language in substance the same as that in section 2 of Act No. 578. Those acts were ordered to take effect April 1, 1906, and were approved June 1, 1905.

The same legislature shortly afterwards passed Local Act No. 667, detaching the territory mentioned in Act No. 578 from school district "The Public Schools of Iron River," and attaching the same to the district "The Public Schools of Stambaugh." The body of the act contained the requisite provisions for carrying it into effect. This act was also ordered to take effect April 1, 1906.

The respondent, the treasurer of Iron county, proceeded to collect the delinquent and other taxes, and, of the amount so collected, $5,761.49 were taxes for township and school purposes. The relator made a demand upon the respondent for these taxes. The demand was refused and the relator then filed its petition in the circuit court for the county of Iron, praying the writ of mandamus to compel the payment to it of the taxes thus collected. The court granted the writ, and the proceeding is before us for review under the writ of certiorari.

GRANT, C. J. (*after stating the facts*). The territorial limits of the municipality known as the public schools of Iron River and the township of Iron River were identical. The same is true of the township and school district of Stambaugh. It was clearly the intent of the legislature by these three acts to change the territorial boundaries of the townships of Iron River and Stambaugh and of the school districts existing in each, to vacate the township of Atkinson and attach its territory to the township of Stambaugh, and to provide for the distribution of the uncollected taxes. By this act the territory of Atkinson became a part not only of the township

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of Iron River but of the school district of Iron River. The delinquent taxes which, at the time of these changes, had been returned by the township treasurer for nonpayment, were afterwards collected through the agencies of the State and county and were paid over to the respondent.

It is urged that the treasurer of Stambaugh could not collect and enforce the payment of these taxes, because his control over proceedings to collect and enforce had ended, that the enforcement and collection of them devolved exclusively on the county treasurer and auditor general, that his only further duty was to receive from the county treasurer at stated quarterly intervals the proceeds of school and township taxes which the county treasurer or the auditor general had collected, and that therefore there were no taxes to which the language of the act could be applied. The language of these acts will not bear this construction. When these delinquent moneys had been paid to the county treasurer, the township treasurers to whom they were payable certainly had the right to demand payment, and, upon refusal by the county treasurer, could take the necessary proceedings to enforce payment. The county treasurer and auditor general are mere conduits through whom delinquent taxes when paid are conveyed to the township treasurer.

The words used in the statute, "collect and enforce," include the power to receive moneys from those authorized to pay them. The purpose and effect of both acts were to clothe the treasurer of each township with the power to receive all moneys belonging in the township treasury and to take the necessary steps to obtain them. The power to so provide is clearly vested in the legislature. Its manifest intent must prevail over the literal sense of terms. 1 Kent's Commentaries, p. 462; *Green* v. *Graves*, 1 Doug. (Mich.) 351. The township of Iron River had not acquired vested rights in the delinquent taxes of this detached territory so that the legislature, in dividing the territory, could not transfer the right to uncollected taxes from one township to the other.

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The other contentions in behalf of respondent are answered against him by *Perrizo* v. *Kesler*, 93 Mich. 280; *People* v. *Worden Grocer Co.*, 118 Mich. 604; *Attorney General, ex rel. Kies*, v. *Lowrey*, 131 Mich. 639; *Attorney General, ex rel. Battishill*, v. *Township Board of Springwells*, 143 Mich. 523. All the provisions in the body of the act were germane to its title.

The judgment is affirmed.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

WOODWORTH *v.* DETROIT UNITED RAILWAY.

1. RAILROADS—NEGLIGENCE—DEFECTIVE CROSSING—EVIDENCE—PRIOR ACCIDENTS—ADMISSIBILITY.

   In an action against a railroad company for a wrongful death resulting from deceased's vehicle catching in a vacant space between the planking and defendant's track at a crossing, evidence of prior accidents of a similar nature is admissible to show negligence on the part of defendant in maintaining its crossing in that manner. *Gregory* v. *Detroit United Railway*, 138 Mich. 368, overruled.

2. SAVING QUESTIONS FOR REVIEW—EXCEPTIONS—NECESSITY.

   Whether the court erred in permitting a view, and in subsequently permitting plaintiff to prove alterations in the premises since the accident, will not be considered where no objection or exception was taken to the rulings.

Error to Oakland; Law, J., presiding. Submitted January 21, 1908. (Docket No. 111.) Decided May 27, 1908.

Case by Willis Woodworth, administrator of the es-

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tate of Rex Woodworth, deceased, against the Detroit United Railway for the negligent killing of plaintiff's intestate. There was judgment for plaintiff, and defendant brings error. Affirmed.

Brennan, Donnelly & Van De Mark and *James H. Lynch*, for appellant.

Dohany & Dohany, for appellee.

CARPENTER, J. About three and one-half miles east of Farmington Junction defendant's railway crosses the roadbed of Grand River road at an acute angle. This crossing is called the Volney Smith crossing. As Rex Woodworth, plaintiff's intestate, attempted to drive over this crossing, the left front wheel of his wagon caught in a vacant space between the rail and the planking; his horse could not move it, and a car operated by defendant collided with his vehicle and killed him. This suit was brought to recover compensation. The issue was submitted to a jury who rendered a verdict in plaintiff's favor. We are asked to reverse the judgment entered upon said verdict for several reasons.

1. Plaintiff was permitted to prove by one of defendant's employés, a section man, that at least a dozen rigs had been stuck in this crossing in the same way as was that of plaintiff's intestate; that the first of these occurrences happened about two years before; the others from time to time up to about a month before the disaster in suit, and on one of these occasions a wagon wheel was broken. This testimony was received notwithstanding the circumstance that counsel for defendant admitted in open court that "whatever the condition of that crossing at the time in question, defendant had full knowledge of it and had full knowledge of it at least six months prior thereto. We do not admit that it was defective." Defendant relies upon the case of *Gregory* v. *Railway*, 138 Mich. 368. That case was very similar to this, and we

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there decided that testimony like that under consideration was inadmissible. We said:

"Evidence was received, under objections and exception, to show prior accidents of a similar character at this same place. Such testimony is only admissible to show notice and knowledge of the defects. *Grand Rapids, etc., R. Co.* v. *Huntley*, 38 Mich. 537; *Corcoran* v. *City of Detroit*, 95 Mich. 84; *Alberts* v. *Village of Vernon*, 96 Mich. 549.

"Defendant's counsel upon the trial admitted that the condition of the rails and street at this point was the same as it had been from the 1st of December previous. The sole question, therefore, was the condition of the street, and whether its condition was negligence. Proof of prior accidents was immaterial, and would naturally tend to prejudice the defendant."

I participated in that decision and approved the foregoing reasoning and am bound to admit that I am as responsible for it as if I had written it. I am compelled now to say that, in my judgment, the decision was erroneous, and I think we should take this, the first opportunity, of overruling it.

It is apparent from the above quotation that it was our opinion that testimony of prior accidents was admissible for the purpose of establishing defendant's knowledge of the condition of the street, but not for the purpose of proving negligence. Here is where I think we erred. I think such testimony has a bearing upon the question of negligence. None of the authorities cited in the opinion in *Gregory* v. *Railway*, supra, touch this question. None of the authorities of other States which hold that testimony of prior accidents is not admissible have any bearing, for we hold it admissible, and with the exception of *Gregory* v. *Railway*, there is nothing in our decisions which indicates that it is not admissible for all legitimate purposes. Such testimony has a legitimate bearing upon the issue of negligence. In this case the burden rested upon plaintiff to prove not only the existence of this space between the rail and the planking, but also to prove that

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it was negligent for the defendant to leave that space in that condition. In determining the question of negligence, it becomes important to inquire: Should defendant have anticipated that the wheels of wagons attempting to cross its railway would get caught in this space? Testimony that wagons had actually been so caught a dozen times in two years, especially if, as may be inferred, these occurrences were known to defendant, answers this question, or, at least, affords great aid in answering it.

In *Hoyt* v. *Jeffers*, 30 Mich. 181, this court said:

"With actual notice of the danger from this cause [the throwing of sparks from the chimney of a saw mill], the defendant might justly be held to a somewhat stricter measure of diligence, than if ignorant of it, and to some extent this might make that negligence which otherwise would not be so."

In *Smith* v. *Township of Sherwood*, 62 Mich. 165, plaintiff brought suit to recover for damages resulting from his horse shying at a hole in a bridge. This court held that testimony proving that other horses had shied at this hole was properly admitted, saying:

"The evidence was therefore competent to show the existence of the defect for some time, and that it was calculated to frighten horses. It tended to show the dangerous character of the hole in the bridge, and, as more or less publicity would naturally be given to such occurrences, it also tended to show that knowledge of such dangerous character was brought to the attention of the township authorities."

See, also, *Lombar* v. *Village of East Tawas*, 86 Mich. 14; *Retan* v. *Railway Co.*, 94 Mich. 146; *Darling* v. *Westmoreland*, 52 N. H. 401; *House* v. *Metcalf*, 27 Conn. 631; *District of Columbia* v. *Armes*, 107 U. S. 519.

I conclude, therefore, that no error was committed in receiving the testimony under consideration.

2. Complaint is made because the trial judge permitted the jury to view the scene of the disaster; and

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3. Because he subsequently permitted plaintiff to prove that a change had been made whereby the traveled portion of the road crossed said highway at a less acute angle than it did at the time plaintiff's intestate was killed.

If there was no error in permitting the jury to view the scene, there was no error in the introduction of the testimony complained of; for it was necessary to introduce that testimony to prevent their getting an erroneous impression. We dispose of each of these complaints when we say that we cannot hold that the trial judge erred in permitting the jury to view the scene. No objection was made to his ordering that view, and no exception was taken. The question is not, therefore, before us.

No other question demands consideration.

The judgment is affirmed.

BLAIR, MONTGOMERY, OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

GRANT, C. J. (*concurring*). I concede that there are cases where results are indicative of negligence, and are therefore admissible in evidence. If *Gregory* v. *Railway*, 138 Mich. 368, can be justly construed as stated in my Brother CARPENTER'S opinion, and if the profession so understand it, it should be modified, or, if necessary, overruled. However, a careful reading of the opinion and of the record and briefs in that case will show that it does not hold that the evidence of accidents (without detailing them), or of the conditions which might result in accidents, is not competent. No such question was raised in that case before the trial court or in the briefs of counsel in this court. I have re-examined them. Upon the trial, after the concession made by the defendant that the crossing was in the same condition that it had been for a long time before the accident, counsel for plaintiff stated "that the evidence was offered for the purpose of showing that the rail at that place extended above the level of the street; also as constructive notice to the com-

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pany, defendant." Counsel for plaintiff, Gregory, stated their position in their brief as follows:

"This testimony is admissible for the purpose of showing a continuation of the defect in question, from which continuation notice to the defendant may be inferred."

Therefore the question now before us was not presented in that case. The authorities cited in that opinion (written by the writer of this) do, in my judgment, sustain the rule that, under the circumstances in the *Gregory Case*, and the contentions and concessions of counsel therein, evidence of prior accidents was immaterial. The question, however, in my judgment, is of no consequence in this case, since the trial judge, when his attention was called to the *Gregory Case*, emphatically instructed the jury to disregard the evidence complained of. I, therefore, concur in affirming the judgment.

HYMAN v. KIRT.

1. BILLS AND NOTES—ACTION—EVIDENCE—FORGERY—OTHER FORGERIES—ADMISSIBILITY.

In an action on a promissory note, the defendant having denied the execution of the note, testimony tending to show that plaintiff left for collection another note purporting to be signed by another party, and on being confronted with the supposed maker, made contradictory statements, from which the jury might infer that the note was a forgery, is admissible on the question of intent.

2. SAME—RESULT OF SIMILAR ACTION.

Where the defendant has denied the execution of the note sued upon, inquiry into the result of an action by the same plain-

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tiff upon another note, in which the defense was that the note had been paid, raises a collateral issue which plaintiff cannot be expected to be prepared to meet, and is incompetent.

3. TRIAL—RECEPTION OF EVIDENCE—CURE OF ERROR.
An instruction in which the court states his recollection that certain incompetent testimony was not received, and that counsel was in error in referring to it, and that the jury will not take it into consideration, does not cure the error in receiving the testimony.

4. SAME—ARGUMENT OF COUNSEL—PREJUDICIAL STATEMENTS.
Reference by counsel to a party in argument as a "Jew horse dealer" is reprehensible, and in a proper case may cause reversal.

Error to Leelanau; Mayne, J. Submitted April 17, 1908. (Docket No. 113.) Decided May 27, 1908.

Assumpsit by Herman Hyman against Joseph Kirt on a promissory note. There was judgment for defendant, and plaintiff brings error. Reversed.

Pratt & Davis, for appellant.

John W. Patchin and *C. L. Dayton*, for appellee.

MONTGOMERY, J. The plaintiff brought an action to recover on a promissory note of $2,140. The defendant, on oath, denied the execution of the note, and this presented the issue which was tried before the jury. It was conceded by the plaintiff that the note included a considerable sum of usury. It was claimed that the amount of money actually advanced to the defendant was $1,850, and for this sum the plaintiff claimed judgment. Plaintiff's testimony tended to show the execution of the note by the defendant as a culmination of dealings extending over a considerable period. The defendant, on the other hand, denied that he had ever signed the note in question knowingly, although admitting that the signature looked like his, his theory being that he had been asked by plaintiff to witness a chattel mortgage, and that the note had been substituted in place where his signature was to appear

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upon the mortgage and the signature to the note thus obtained.

The errors assigned relate to the admission of testimony and to the remarks of counsel in the argument to the jury.

On the trial, the defendant sought to show that a like claim on a note had been made by plaintiff during the time the present note was extant against one John Gilness, and that plaintiff had deposited a note of that description with the bank at Traverse City, who had in turn notified one Jonas Gilness, who was the only person of that name residing in the neighborhood where the note purported to have been made, and who was often called John Gilness, and that upon Jonas Gilness confronting the plaintiff, he made contradictory statements, from which the jury might have inferred that the note was a forgery. We think testimony of this character was admissible as bearing upon the question of intent. *Beebe* v. *Knapp*, 28 Mich. 53; *French* v. *Ryan*, 104 Mich. 625; *Cook* v. *Perry*, 43 Mich. 623; *Beard* v. *Hill*, 131 Mich. 246, which is a case very similar in its facts.

On the cross-examination of plaintiff, he was asked if he had had trouble of this same nature before in court. This was admitted, subject to objection and exception, and the plaintiff thereupon testified that he had a suit on a note but not a suit where the people had denied the execution of the papers, but one in which the defendants had claimed that the note had been paid, and defendant's counsel showed in this suit that the jury found that the notes had in fact been paid, and plaintiff had been defeated on that ground. In the argument to the jury this testimony was referred to, and it was stated that plaintiff "admits that he sued an old man and his wife on notes for $2,500, notes that the jury found in that very case had been paid." It will be noted that this testimony had no bearing on the question of the guilty knowledge of the plaintiff or of the intent in securing the signature, its only bearing being that it might tend to show, if the record of that case was competent testimony to show it, that the plaintiff had been discredited by a jury on an-

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other trial. This was not competent testimony. It introduced a collateral issue which the plaintiff could not have been expected to be prepared to meet. Before the jury could properly determine that the result in that case should weigh against the credibility of the plaintiff, it would have been necessary to try out the issue presented before the jury in that case. See *Brennan* v. *Busch*, 67 Mich. 670.

The circuit judge in his charge used the following language:

"Reference was also made to a former suit in which it is alleged the plaintiff lost because the other parties came in and testified that payment of the note was made. My recollection of that matter is that I sustained the objection made by the plaintiff to the testimony and it was not admitted. But counsel, in the heat of the argument, probably forgot the ruling of the court in that matter when they referred to the same in the argument. So, gentlemen, you will not take that into consideration at all."

It is evident that he was mistaken as to the fact of the testimony having been admitted, and the question remains as to whether this language of the court cured the error in receiving the testimony. We are not able to say that it would have this effect. The testimony had been received, it had been dwelt upon by counsel in his argument to the jury, and we cannot feel assured that it had not had its effect. See *Maxted* v. *Fowler*, 94 Mich. 112.

The reference by counsel to plaintiff as a Jew horse dealer was, to say the least, most unfortunate, and it is difficult to conceive how counsel should be betrayed by his zeal into using such language, in view of the decision in this court in *Cluett* v. *Rosenthal*, 100 Mich. 193. We need not determine whether the withdrawal of this expression and the instruction of the court cured the error, as, for the error in admission of testimony relating to the other litigation, the case must be reversed and a new trial ordered.

GRANT, C. J., and BLAIR, CARPENTER, and MCALVAY, JJ., concurred.

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PEOPLE v. KEMMIS.

1. SAVING QUESTIONS FOR REVIEW — OBJECTION BELOW — COMPETENCY OF WITNESS.
   Whether it was error, under section 10215, 3 Comp. Laws, to receive the testimony of a boy over 10 years of age, without his being sworn, will not be decided, where the objection was not made in the trial court.

2. SAME—ORDER OF PROOF.
   Error in admitting on rebuttal evidence that would have been competent in chief cannot be availed of where not objected to below.

3. CRIMINAL LAW—INSTRUCTIONS—CHARACTER OF RESPONDENT.
   The defendant in a criminal case is not entitled to an instruction, there being no testimony upon the subject, that he is presumed to be a man of good character.

4. INTOXICATING LIQUORS—STATUTES—CONSTITUTIONALITY.
   The law regulating the sale of intoxicating liquors in this State is constitutional.

Exceptions before judgment from St. Clair; Law, J. Submitted May 7, 1908. (Docket No. 125.) Decided May 27, 1908.

Walter Kemmis was convicted of violating the liquor law. Affirmed.

Cady & Crandall and *David Fitzgibbon*, for appellant.

Alex. Moore, Prosecuting Attorney, for the people.

CARPENTER, J. Respondent was convicted of the offense of selling intoxicating liquor without first having paid the annual tax required by section 5385, 2 Comp. Laws. He asks us to set aside his conviction for several reasons.

1. George Mitchell, a boy between 10 and 11 years of

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age, was called as a witness by the people. It appeared from the preliminary examination undertaken by the court that he did not understand the nature of an oath. He was permitted to give his testimony without being sworn. No exception was taken. But at the conclusion of the case, respondent's counsel asked the court to strike out the testimony "for the reason that the preliminary examination given to him by the court does not show that he was aware of the nature of an oath." This motion was overruled and thereupon the further motion was made "to strike out his testimony for the reason that the witness was not sworn." It is now insisted that the testimony was improperly received because, as the witness was over 10 years of age, his unsworn testimony should not have been received. Section 10215, 3 Comp. Laws. We dispose of this contention by saying that it was not made in the trial court and cannot be made for the first time in this court.

2. Upon rebuttal the people were permitted to prove the condition of defendant's premises subsequent to the date of the alleged commission of the offense. The argument of respondent's counsel assumes that it would have been competent to introduce this testimony before the people had rested their case. See *People* v. *Hicks*, 79 Mich. 457. But it is argued that it was an abuse of discretion for the trial court to permit it to be introduced in rebuttal. Assuming, as we must, that the testimony was admissible, we cannot say that there was any error in admitting it on rebuttal, for the objection to its being so admitted was not raised on the trial by respondent's counsel.

3. It is contended that the court erred in refusing to charge the jury, as requested, that defendant was presumed to be a man of good character. There was no testimony upon this subject. Under such circumstances there was, of course, no presumption that defendant was a man of bad character. Is there a presumption that defendant was a man of good character? There is high authority for saying that there is. See *Mullen* v. *U. S.*,

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46 C. C. A. 22. Of this decision Mr. Wigmore in his work on Evidence, § 290, note 2, says:

"This inconsistently gives him the untrammelled benefit of evidence which if he had introduced might have been disputed. What really happens, or ought to, is that the defendant's character is simply a non-existent quantity in the evidence. This distinction has sometimes been expressly pointed out; *Addison* v. *People*, 193 Ill. 405; *Knight* v. *State*, 70 Ind. 380."

We approve and adopt the rule stated by Mr. Wigmore, and therefore overrule the objection under consideration.

4. It is contended that the law regulating the sale of intoxicating liquors in this State is unconstitutional. The questions raised by this argument are not open ones in this State. See *Robison* v. *Miner*, 68 Mich. 549; *People* v. *Luby*, 99 Mich. 89.

The conviction is affirmed.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

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JUNE TERM, 1908.

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DRAPER *v.* BROWN.

1. EVIDENCE — ADMISSIONS — LETTERS — COMPETENCY — RECOLLECTION OF WITNESS.

   Where a letter previously written by a witness is offered in evidence as containing a statement by defendant upon which complainant relies as an admission, its competency depends primarily upon the ability of the writer to guarantee that it accurately represents his knowledge and recollection at the time; and where the writer has no independent recollection of the matter, and the letter does not aid or refresh his recollection, it is not competent.

2. SAME — EFFECT.

   A letter written by an agent to his principal, regarding a loan applied for by defendant, wherein it is stated "He [defendant] offers his wife's mortgage on the house and lot he occupies," is not admissible as an admission by defendant that the title to the property was in his wife, the issue being whether a deed, admitted to have been executed in her favor, was ever delivered.

3. DEEDS — DELIVERY — EVIDENCE — ACTS OF GRANTOR — EFFECT.

   On a bill to re-establish a deed, admitted to have been executed by defendant to his wife, since deceased, as grantee, but claimed to have never been delivered, the fact that defendant, after her death, obtained from complainant, her sole heir and legatee, a quitclaim deed "for the purpose of perfecting the title" on account of the "unrecorded" deed, is not conclusive of the fact of delivery of the original deed, but is, at most, a circumstance to be considered in determining whether there was a delivery.

4. WITNESSES — COMPETENCY — TRANSACTIONS WITH PERSONS SINCE DECEASED.

   On a bill by the sole heir and legatee of a testatrix against her surviving husband to restore a deed, admitted by him to have

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been executed in her favor, but never delivered, he is not prohibited by the statute from testifying that after executing the deed he kept it in his safe at his place of business, and that his wife never saw it unless at the time of its destruction, although she was told by him that the deed was in existence and where to find it.

5. DEEDS—DELIVERY—EVIDENCE—SUFFICIENCY.

On a bill by the sole heir and legatee of a testatrix against her surviving husband to restore a deed, admitted by him to have been executed in her favor, but never delivered, evidence examined, and *held*, that complainant has not, by a preponderance of the evidence, aided by the presumptions the court is bound to indulge, established the fact that testatrix died seised of the property in question.

6. EXECUTORS AND ADMINISTRATORS — CLAIMS — ALLOWANCE — COURTS—EQUITY—JURISDICTION.

It is not the province of a court of equity to allow or disallow claims against the estates of deceased persons, or to administer estates; especially after the subject has been entered upon in the probate court.

7. WILLS — CONSTRUCTION — BILL TO OBTAIN — JURISDICTION — CHANCERY COURT.

The superior court of Grand Rapids, in chancery, has jurisdiction to determine the ownership of a homestead, the issue being whether an unrecorded deed to decedent from her husband was ever delivered, to construe her will, and to instruct and direct the trustee thereunder with respect to the trust estate.

8. EXECUTORS AND ADMINISTRATORS—MANAGEMENT OF ESTATE—MORTGAGES—PAYMENT—DUTY OF EXECUTOR.

A will by which testator devised certain mortgaged land to her executor in trust, income payable to her daughter for life, remainder to certain other persons, and the residue of her estate to her executor in trust, income payable to her daughter for life, remainder to persons other than the remaindermen in the preceding paragraph, considered, together with the surrounding circumstances, among them being the fact that the estate, aside from the mortgaged property, was insufficient to pay the mortgages, and *held*, that testatrix did not, by a general direction to pay her debts, direct her executor to pay the mortgages, and that no duty devolved upon him so to do.

9. SAME.

Where a will does not devolve upon the executor the duty of

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paying mortgages upon real estate, but shows a contrary intention, and the mortgage debts are not provable, or not proved, against the estate, the executor cannot pay them.

10. ESTOPPEL—EQUITABLE ESTOPPEL—CESTUI QUE TRUST.
Where an executor and trustee under a will had no right to use the income from one trust fund to preserve another, but the beneficiary for life of both funds knew of his doing so and made no objection, she is estopped to thereafter complain of his action in so doing.

11. TRUSTS—MANAGEMENT BY TRUSTEE—SEPARATE FUNDS—USE OF ONE FOR BENEFIT OF OTHER.
Where an executor and trustee under a will without right used the principal of one trust fund to preserve real estate constituting another trust fund, by paying the interest on mortgages thereon, he will, for the purpose of an accounting, be charged with such principal; but he will have a lien upon the other fund for reimbursement out of any surplus which may remain after payment of the mortgages thereon.

12. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—LIMITATIONS—PAYMENT BY EXECUTOR—EFFECT.
The policy of our law, as declared in the statutes (sections 9375, 9380, 3 Comp. Laws) and by the court, is to commit allowance of claims against estates to a commission, to refuse allowance of demands barred by the statutes, and to confine the administrator to the payment of claims duly allowed; whence payments by an executor of interest upon mortgages upon real estate belonging to his testatrix, whatever effect they may have to preserve the lien of the mortgages, do not operate to suspend limitations as to the mortgage debt, and the executor or administrator may not by such payments either revive a demand barred by the statute at the decease of the debtor, or admit the liability of the estate upon one otherwise barred.

13. COSTS—ON APPEAL—MODIFICATION.
The modification of a decree on appeal being substantial, the appellant was awarded costs of the appeal.

Appeal from the superior court of Grand Rapids; Stuart, J. Submitted November 22, 1907. (Docket No. 32.) Decided June 27, 1908.

Bill by Mabel B. Draper against Henry D. Brown, individually, and as executor of the last will and testament

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of Cordelia Brown, deceased, Mary Brown, the People's Savings Bank, and others, to re-establish a deed, to set aside a deed obtained by fraud, to set aside a mortgage, to construe a will and compel the execution of the trusts created thereby, and for an accounting. From a decree dismissing the bill, complainant appeals. Modified.

Crane & Norris (*William Aldrich Tateum*, of counsel), for complainant.

Wesley W. Hyde and *Howard A. Thornton*, for defendant Henry D. Brown.

Gleason & Lee, for defendant Mary Brown.

John Carveth (*Butterfield & Keeney*, of counsel), for defendant People's Savings Bank.

OSTRANDER, J. The complainant, who was born October 31, 1870, is the only child of Henry D. and Cordelia Brown, nee Rogers, who were married June 20, 1854, and who lived and cohabited together as husband and wife until the death of Cordelia, September 7, 1891. Complainant in October, 1892, married Morris B. Draper, and of the four children born to them, three, Helen Louise, Jerome Chester, and Morris B., who are made defendants and who appear by their guardian ad litem, are living. Henry D. Brown, who is now upwards of 79 years of age, was again married January 24, 1893, to Mary E. Combs, with whom he is still living. Cordelia (Rogers) Brown died testate. Her will was executed August 6, 1891. It was admitted to probate October 19, 1891. Henry D. Brown, who was named therein as sole executor, qualified as such November 7, 1891, and has since, with an exception to be noted, had the care and management of the estate. By the terms of the will, the executor is directed to pay all lawful debts existing against the testatrix at the time of her death and the expenses of settling the estate. After giving to her husband and daughter all silverware, household goods, wares, fixtures and furniture, and all

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pictures and paintings, and to her daughter all her personal wardrobe, wearing apparel and jewelry, to her physician all notes she held against him and the sum of $200 in money, which provisions are found in the first four paragraphs of the will, the fifth and sixth clauses read as follows:

"*Fifth.* The real estate I own, situate in the city of Grand Rapids, Michigan, at the northeast corner of Fountain and Bostwick streets, in said city, and particularly described in my deed thereof from Charlotte Pressburg and husband, dated April 30, 1885, and recorded in the register's office of Kent county, Michigan, November 25, 1885, in liber 170 of deeds, at page 170, I give, devise and bequeath to my said husband, Henry D. Brown, in trust nevertheless to and for the following purposes: To keep the same rented and from the income thereof keep the buildings thereon at all times properly insured, to pay all necessary taxes and repairs, and any other expenses that may be incurred in the care and management of the said property, and then to pay what then remains of such income to my said daughter, Mabel H. Brown, for and during the period of her natural life, the said net income thereof to be so paid her annually, and upon her death I give, devise and bequeath the said real estate and property to the child or children of my said daughter, if any such child survive her, and if she die without child her surviving, then the said property shall pass to the children of my sister, Helena M. Post, of Rochester, N. Y., and to the children of my sister-in-law Sophia Bryant, of Olivet, Michigan, the same to be divided between the said children, share and share alike, and in case of the death of any such children, leaving him or her surviving lawful issue, then such issue shall take the share that the deceased parent if living would have taken. By the child or children of my said daughter, Mabel H. Brown, I mean the issue of her body, or any child she may lawfully adopt so as to become her heir. If at any time in the judgment of my said trustee it may be wise and for the best interests of my said daughter to sell said real estate and convert the same into interest-bearing securities, then I authorize such sale to be made, provided my said daughter thereto consent, and direct that the net avails of such property be then invested in interest-bearing securities, the net income thereof to be paid to my said daughter

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during her life and then at her death what remains shall pass in the same manner and to the same persons who would have taken it had it remained real estate as provided hereinbefore in this clause of my will.

"*Sixth.* All the rest, residue and remainder of the estate I may own or in any way be entitled to at my decease, both personal and real, after satisfying the provisions of the foregoing clauses of this my will, I give, devise and bequeath to my said husband, Henry D. Brown, in trust, for the following purposes: I direct my said trustee to sell and convey the real estate at such time as in his judgment it may be wise and convert the same, together with the personal estate, from time to time, as he may be able, into interest-bearing securities, and to pay from the income thereof all taxes upon said trust estate and all expense incurred in the care and management thereof, and then pay the balance of said income each year to my said daughter, Mabel H. Brown, until the death of my said husband, should my said daughter survive him, and then upon the death of my said husband I give the entire of said trust estate then remaining to my said daughter, Mabel H. Brown, and her heirs forever, and in case my said husband shall survive my said daughter, then upon the death of my said daughter, what then remains of said trust estate shall pass to the legal heirs of my said daughter, except in case my said daughter shall have made a will which shall after her death be admitted to probate, in which she shall have devised or bequeathed the said trust estate, then in that case the said estate, on the death of my said daughter, shall pass to the legatees in her said will named in such manner as she shall have designated therein."

The time limited for the presentation of claims was June 11, 1892. One claim only was presented, the claimant being Clark H. Gleason, who drew the will. The amount of his claim was $15, and this was allowed. An order was duly entered closing the estate against claims. September 8, 1893, Henry D. Brown, as executor, filed his first account, and thereafter successive accounts were filed October 16, 1894; October 1, 1895; October 2, 1896; November 19, 1897; December 2, 1899; December 30, 1904. February 23, 1905, what is called a summarized executor's account was filed and a statement summarizing

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receipts and disbursements as they appear by the annual reports with reference to the two trust funds created by the will. Upon none of these accounts was there any hearing. There was no publication of notice of hearing or proof of personal service of notice of hearing. None of them were settled and allowed. By a stipulation, it was agreed between complainant and Henry D. Brown that a hearing in open court be had upon all the reports on the 8th day of February, 1905, at 10 o'clock. Sometime in March, 1905, as the record is understood, Mary (Combs) Brown petitioned the probate court to revive the commission on claims and to allow further time for the examination and adjustment of claims, setting up that she was the owner of a valid claim amounting to $2,500, which she had not presented. In an amended petition, which was filed March 28, 1905, she sets out the basis of her claim with more formality. Her claim, known in the record as the Pressburg note and mortgage, was allowed by the probate judge, who acted as commissioner on claims, at the sum of $2,636.67, and a certain mortgage, known as the Lovett estate mortgage, amounting to $2,556.67, was allowed as a contingent claim against the estate. Complainant appealed from this order to the circuit court for the county of Kent, and her appeal was perfected and is pending.

June 6, 1905, complainant filed the bill in this cause. She asks that a quitclaim deed of the homestead, made by her to her father, be canceled; that a mortgage upon the homestead given to the People's Savings Bank by her father November 14, 1894, to secure payment of borrowed money, be canceled; that her father account for the annual value of the use and occupation of the homestead; that her father account for all funds which came into his hands as charged in the bill; that he account for household goods and chattels; that the will be construed; that defendant Mary Brown be decreed to deliver up the Pressburg note and mortgage and that it be discharged and canceled; that it be decreed that she has no claim against

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the estate of Cordelia Brown; that Henry D. Brown be restrained from proceeding in an accounting in the probate court and from disposing of any of the estate, and the defendant Mary Brown be restrained from the prosecution of her claim until the further order of the court. The case was heard in open court. None of the answers challenge the jurisdiction of the court, but when the taking of testimony began it was objected on the part of defendants that the court had no jurisdiction in the matter of an accounting, and that the allowance of claims in probate court could not be reviewed by the superior court of Grand Rapids.

The questions involved in the appeal from a decree dismissing the bill of complaint are stated by counsel for complainant and appellant as follows:

"1. Whether or not Cordelia Brown died seised in fee simple of the Brown homestead under a conveyance of the same to her by Henry D. Brown. If this issue is found for the complainant, then,

"2. Whether or not the defendant, Henry D. Brown, obtained from Mabel B. Draper the quitclaim deed of the homestead of date September 6th, 1893, by fraud, and the deed should be set aside; and,

"3. Whether or not the People's Savings Bank is a mortgagee in good faith.

"4. Whether or not the bequest of the residuum by the 6th paragraph of Cordelia Brown's will created a separate and distinct trust fund, not liable to share in any losses of the other trust created by such will.

"5. Whether or not it was the duty of the executor under the law and the will to invest the residuum of the estate and pay the income thereof annually to the complainant, and if he failed in such duty to make good to the complainant the loss from his neglect.

"6. Whether or not the executor is liable to make good to the complainant the loss of the Bostwick street property by reason of gross neglect and bad faith in failing to sell such real estate and invest the proceeds as required by the 5th paragraph of the will.

"7. Whether or not Henry D. Brown as executor, by the purchase of the Pressburg mortgage in the name of Mary Brown and procuring in her name the allowance of

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two claims thereon, both barred by the statute of limitations, did not attempt to defraud the complainant of her entire estate under her mother's will.

"8. Whether or not the executor should be charged with $3,000, as one-half of the premium paid by Eliza Sprague to Henry D. Brown and Cordelia Brown for the purchase of the Sprague annuity, together with interest thereon.

"9. Whether or not the executor, because he kept no separate account of the trusts created by the will, nor any account of the money belonging to the estate, nor made any investment of the residuum, and received and used all the trust funds as his own money during his entire administration, is entitled to compensation and commissions.

"10. Whether or not the admission of the incompetent testimony of Brown, the surviving grantor and her agent managing her personal estate, eliminated from the case a consideration of the fact that the trial judge saw the witnesses, and,

"11. Whether or not the defendants by answering without any objection to the jurisdiction of the court, can, after the hearing has begun, raise a question of jurisdiction by objections to evidence.

"12. Whether or not the complainant has been guilty of laches."

Quite the most important question in the case is the one concerning the ownership of the homestead. It is a valuable property, worth $10,000 or more. Its rental value is $850 per annum. Complainant charges that her mother, Cordelia, died seised of the property, it having been conveyed to her on or about December 31, 1878, by defendant Henry D. Brown. She charges further that she knew nothing about this conveyance and her mother's right until shortly before the bill in this cause was filed. The conveyance was not recorded and is not produced. Some of the facts going to make up the history of the matter are not in dispute. Henry D. Brown did, as his answer admits, execute a deed of the property to his wife. This admission is coupled with the statement:

"That the said deed was never delivered to her and was never intended to be delivered unless he died before she did; that it was executed and placed in an envelope

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marked to be delivered on his death and was intended as a testamentary disposition of his property in case said Cordelia Brown should survive him; that said deed always remained among his private papers, and that with the knowledge and consent of the said Cordelia Brown the same was destroyed several months before her death and that it was so destroyed before the time she made her last will and testament."

Henry D. Brown purchased the property in 1874. The record title was then and is now in him. It is not claimed that Cordelia paid him for a conveyance of the property. In September, 1893, complainant, at the request of her father, executed and delivered to him a quitclaim deed of the property, which he had caused to be prepared, and this deed was recorded September 8 1893. It contained the following recital:

"The purpose of this deed is to perfect the title to said premises in said Henry D. Brown, the said premises at one time having been deeded by said Henry D. Brown to his then wife, Cordelia Brown, also known as Delia Brown, now deceased, and the deed having been destroyed without ever having been recorded, the said Mabel H. Brown, now Mabel Brown Draper, being the only child and sole heir at law of said Cordelia Brown, deceased, and the sole legatee in the will of said Cordelia Brown, deceased."

This deed recites a consideration of one dollar. No consideration, in fact, passed.

There is no evidence that Cordelia ever claimed to own the homestead or asserted title thereto, unless such evidence is found in the following facts: Henry D. Brown was indebted to John Lawrence in the sum of $12,000, evidenced by a note made by Brown and guaranteed by his wife, payment of which was secured by a real-estate mortgage. A release of part of the mortgaged premises was given, and, under date October 28, 1882, Brown and his wife made a new mortgage conveying the homestead as security for the debt in place of the property released. The mortgage recited the earlier mortgage, the release of a part of the mortgaged premises, and contained the fur-

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ther recital that it was given as collateral security to the earlier mortgage. In 1884, Mr. Lawrence assigned both mortgages to William B. Ledyard. Thereafter, under date March 28, 1885, a mortgage conveying the homestead was executed by Cordelia Brown, described as Delia Brown, to Mr. Ledyard, and was later on duly recorded. This instrument recites that in 1880 Henry D. and Cordelia executed and delivered the first mortgage referred to to Mr. Lawrence, that in 1882 they executed and delivered the second mortgage referred to, the assignment of these mortgages to Ledyard, an agreement to extend the time of payment, and that—

"Whereas, by deed bearing date December 31, 1878, the said Henry D. Brown conveyed to the said Delia Brown the premises described in the mortgage executed as aforesaid on the 28th of October, 1882, which deed is still unrecorded * * * this mortgage being intended as additional collateral security."

Henry D. Brown was not a party to this mortgage. It is assumed that he knew about the transaction at the time it occurred. He paid the indebtedness and the mortgages were duly discharged. In 1888, a mortgage of the homestead was made, describing the grantors therein as Cordelia Brown and Henry D. Brown, husband and wife. Again, in 1890, the homestead was mortgaged, the grantors being described as Henry D. Brown and Cordelia Brown, husband and wife, with the recital that Cordelia conveyed in her individual capacity and as wife of Henry D. Brown. Cordelia Brown was an educated and very intelligent woman. In her will, she does not describe, or refer to, the homestead. The fifth clause of her will, hereinbefore set out, describes other and very much less valuable real estate. She owned, also, an interest in other realty, appraised at the sum of $750, which accounts for the reference to real estate in the 6th clause of the will. The last two mortgages upon the homestead, already referred to, were given to a sister of Cordelia Brown, named Eliza Sprague. The first secured payment of a promissory note for $4,000,

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made by Henry D. Brown, the other secured the performance of the condition of an annuity bond. Mr. Gleason was attorney for Eliza Sprague, and represented her in the settlement of a demand against Henry D. Brown for a legacy coming from her father's estate into the possession of Brown. He arranged for the annuity bond and the mortgage securing the same. He drew the bond and the mortgage and he also drew Mrs. Sprague's will and had it in his possession when she died. He drew the quitclaim deed of the homestead which complainant executed and he drew Cordelia's will. Mr. Gleason testified that before he drew the Sprague mortgage Cordelia told him that a deed had been made to her of the homestead and was not recorded. She did not say whether it had been delivered to her, or whether it was to take effect at Mr. Brown's death. He testified:

"I was working for Mrs. Sprague and I proposed to put that so her property—her rights under that—could never be questioned by any question of the title."

This was the mortgage in which the grantors were described as Henry D. Brown and Cordelia Brown, husband and wife, and Cordelia is described as conveying in her individual capacity and as the wife of Henry D. Brown. William B. Ledyard is dead. No one living is able, it seems, to explain, if explanation is necessary, the fact that Cordelia as sole mortgagee executed to Ledyard the mortgage of the homestead. Henry D. Brown testifies that he had forgotten the transaction. He, and counsel for him, attempts, as is natural, to explain the transaction in accordance with a theory that Brown told Ledyard, or that Ledyard otherwise learned, that there was an unrecorded deed which antedated the mortgage assigned to him by Lawrence, and that, when an extension of credit was asked for, this ultra-precautionary method of insuring his security was adopted. The explanation is not unreasonable, although not conclusive. The significance of the mortgage executed by the wife alone as evidence of an asserted own-

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ership of the property is affected by the facts that the Lawrence mortgage and the first and second mortgage to Mrs. Sprague, all of them executed later than the deed, are signed by both the husband and wife, who are described in the instruments as grantors.

As further evidence tending to prove the delivery of the deed of the homestead, complainant relies upon the contents of a letter written by Mr. John S. Lawrence September 13, 1882, to his father, from whom Brown desired to procure, as has been already stated, a release of mortgaged premises. Mr. Lawrence has now no independent recollection of the offer of new security made by Brown, and the letter does not refresh or aid recollection. He assumes that in his letter to his father he conveyed the proposition made by Brown. The language employed is:

"He offers his wife's mortgage on the house and lot he occupies and tells me that the lot cost $5,000 and the building of the house $16,000 and a little over, and that he was offered $14,000 for the premises very recently."

The letter was written by the witness at a time when recollection of whatever was said by Brown should be fresh. It is a narration from recollection. Other considerations aside, the competency of such evidence is tested, first of all by the ability of the writer to guarantee that the record accurately represents his knowledge and recollection at the time. 1 Wigmore on Evidence, §§ 746, 747; *Fisher* v. *Kyle*, 27 Mich. 454. Upon the subject of Brown's statements concerning ownership of the property, or what words or language he employed, the witness frankly says:

"I can give absolutely no testimony except the probabilities from my having written that to my father. Outside of these letters I know no more about it than the first man you could pick up on the street."

He testifies that he has no independent recollection of the transaction, that except as to value his information concerning the property was derived from Brown and he

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has no doubt that Brown made the statements narrated in the letter. Complainant seeks to give it the effect of an admission made by Brown supporting an inference that his wife owned the property. But the writing, "He offers his wife's mortgage on the house and lot he occupies," is not a memorandum of a statement made by Brown. What is stated is, apparently, a conclusion of the writer. We feel obliged to reject the letter as evidence of an admission by defendant Brown. Its probative value is, in any event, small, for the reason that after making an examination of the title the witness accepted and recorded a mortgage of the homestead executed by Brown and his wife.

We are asked to presume the fact of delivery of the deed of the homestead and the passing of the title thereto by her husband from the fact that Brown procured the quitclaim deed, with its recitals, from his daughter. No one questions the rule that a voluntary conveyance of real estate, deliberately made by a husband to his wife, is binding upon the grantor, and, if the deed is recorded and acted upon by their mutual concurrence, a delivery of the deed and its acceptance may be presumed. *Jackson* v. *Cleveland*, 15 Mich. 94; *Gould* v. *Day*, 94 U. S. 405. Perhaps the rule should be extended to a case in which the heir of the grantee is requested by the grantor to make a reconveyance of the property. There is force to the argument which is advanced that if the deed of the homestead had never been delivered but had been always kept by Brown he would not have desired a conveyance from his daughter. The deed not having been recorded, the obtaining of a reconveyance from the heir, in the absence of other evidence of delivery, and in view of the fact that the admission of its execution relied upon is coupled with a denial of delivery, is in no sense conclusive of the fact of delivery of the original deed, but is, at most, a circumstance to be considered in determining whether there was a delivery. A reason for securing the quitclaim deed may be found in a reported assertion, made by Mr. Draper, of some title

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which his wife had to the homestead. It is not unlikely that the person making the report and Mr. Draper each misunderstood some of the facts, viz., that Mr. Draper understood that Brown was proposing to obtain a loan upon the property belonging to his wife, adjoining the homestead, and that the neighbor Pelton, now deceased, who had been applied to for the money, understood Mr. Draper to refer to the homestead in making his assertion with regard to the interest of his wife. As to the oral testimony affecting the question, we are obliged, after a serious but vain effort to harmonize it, to determine whom we will believe. We find that complainant was told by her father, as early as the year 1893, and before she executed the quitclaim deed, the facts now admitted by him. We find that the important recital in the quitclaim deed executed by her was read over to her, in the presence of her husband, and that Mr. Gleason then and before she executed it told her that Cordelia had told him when he drew her will that she did not own the homestead. We use neither of these declarations as establishing the facts stated, but as charging complainant with knowledge of the position of her father with respect to the title to the homestead. Twelve years later the bill in this cause was filed, and meantime no fact concerning this title has come to the knowledge of complainant except the one that Cordelia was sole grantor in a mortgage of the homestead executed to Mr. Ledyard. No application of the rule which requires close scrutiny of the dealings between father and daughter in the relations here disclosed can aid the daughter until it is first determined that he secured from her by her deed a legal or a beneficial interest in property. The mere fact that he made statements to her which she may have believed and which induced her to give the deed, is not a reason for discrediting those statements, any more than it is a reason for finding them to be true. Henry D. Brown testified, and this testimony we hold is not made incompetent by the statute (*Ripley* v. *Seligman*, 88 Mich. 177, 190),

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that he kept the deed of the homestead in an envelope in his safe at the brickyard, which envelope he produced at the hearing; that his wife never saw the deed unless it was at the time of its destruction, although she was told by him that the deed was in existence and where to find it. The envelope bears the indorsement, now partially erased but visible, "In the event of my death, the within paper to be recorded. H. D. B."

We have concluded, after a survey of all of the evidence bearing upon the question, and without, except as above stated, relying at all upon the testimony of Mr. Brown or upon that of Mr. Gleason, favorable to defendant Brown, that complainant has not, by a preponderance of evidence (*Devaney* v. *Koyne*, 54 Mich. 116), aided by presumptions which we are bound to indulge, established the fact that her mother died seised of the homestead property. We have been strongly influenced by the terms of the will and by the great lapse of time since complainant knew of the execution, the asserted non-delivery, purpose, and destruction of the deed. We thus dispose, adversely to her, of the first, second, and third of complainant's contentions.

It is not the province of a court of equity to allow or disallow claims against estates of deceased persons, or to administer estates; especially after the subject has been entered upon in the probate court. *Shelden* v. *Walbridge*, 44 Mich. 251; *Lafferty* v. *People's Savings Bank*, 76 Mich. 35, 68, and cases cited: *Dickinson* v. *Seaver*, 44 Mich. 624.

The jurisdiction of the superior court of Grand Rapids, sitting in equity, to determine ownership of the homestead, to construe the will of Cordelia Brown and to instruct and direct the trustee with respect to the trust estate, is affirmed. The question said to involve construction of the will is the one numbered 4 by counsel for appellant. The property described in the 5th clause of the will is encumbered by two mortgages, aggregating $5,500. It was purchased by Cordelia, subject to a $3,000 mortgage, $2,500 was paid

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by her and a purchase money mortgage for $2,500 was given. In the mortgage which secures the personal indebtedness of Cordelia, she covenanted that the premises were unencumbered. There are two dwellings upon the property which, since the death of Cordelia, have furnished the only income from the property. The testatrix made no provision for the payment of these mortgages unless it may be said that by the general direction to her executor to pay her debts she contemplated that they would be paid out of that residue which goes to make up the fund under the 6th clause of the will. Whether this was her intention is at least doubtful. Both mortgages were due before she died, and before she made her will. She had paid interest upon them for years. If she had sufficient other estate she could have paid them in her lifetime. The facts that her interest in the property was less than one-half the sum of the mortgage indebtedness and that, if the inventory of her separate estate as made by the executor is correct, her other estate would not pay the mortgage debt—indeed would not pay the larger mortgage—and that she provided in her will for the creation of a fund out of the residue, support the assumption that she thought that the real estate, with the aid of the beneficiary, by an increase in value, by a sale, or otherwise, would in some way take care of itself. If she did not intend that her executor should use her other estate to pay the mortgage indebtedness, then the ultimate devolution of the separate funds created by the will would prevent the trustee from using one fund to augment the other. The owner of the first mortgage could not, in any event, prove his demand against the estate, and was bound to look to the realty. The owner of the other mortgage did not prove his demand. Consequently, assuming, as we do, that payment of the mortgages was not a duty devolved upon the executor by the will, the executor could not pay that indebtedness. *Clark* v. *Davis*, 32 Mich. 154. The owner of the second mortgage might have proved his demand. *Larzelere* v. *Starkweather*,

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38 Mich. 96; *Osmun* v. *Oakland Circuit Judge*, 107 Mich. 27. Nevertheless, the accruing interest, like the accruing taxes, was a debt to be paid, unless foreclosure of the mortgage was to be submitted to. *In re Lambie's Estate*, 94 Mich. 489; *Long* v. *Landman*, 118 Mich. 174. And see *Russell* v. *Wheeler*, 129 Mich. 41. While the testatrix could not, by provisions in her will, interfere with the rights or remedies of her creditors or the holders of liens, she could, and did, control the action of her executor and trustee. The provisions of the will permitted and required him to devote the income of the real estate to its preservation alike from decay and from creditors. He had no right to use the income from the residuary fund to preserve the real estate, and only the consent or acquiescence of the complainant, to whom, alone, the net income from both funds belonged, would excuse him in so doing. The fund itself he could not, by her consent, diminish for such a purpose because complainant may never take the fund. We do not find, as counsel for defendants seem to do, authority to use the residuary fund to pay the interest, in the words, "after satisfying the provisions of the foregoing clauses of this my will," found in the beginning of the 6th clause. Such an interpretation is negatived by the immediate context. There is no provision of the 5th clause of the will to be satisfied out of the rest, residue and remainder of the estate. But, it is the residue of the estate, after taking from it the property theretofore described, which goes to make up the portion, title to which vested in the trustee under the 6th clause. The conclusion reached is, finding no bad faith in the conduct of the trustee in this regard, that complainant, by her knowledge, of the methods employed by her father, is equitably estopped to complain of his use of the income of the residuary fund to preserve the other fund, but that defendant Henry D. Brown must account for any diminution of the fund itself. As between himself and the cestuis que trustent, the funds are distinct trust funds. The fact that if he had not paid the interest or made the repairs the mort-

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gages would have, probably, been foreclosed, is not controlling. The trustee and the court must take the will as it is.

It does not follow that the executor must lose the money so paid, if from the fund created by the 5th clause of the will there shall be realized, finally, sufficient to pay the mortgages and more. In such case, equity requires that the surplus shall be used to restore to the fund created by the 6th clause of the will so much of the principal sum thereof as has been diverted. But meantime, and for the purposes of an accounting, the executor must stand charged with the principal of the last-mentioned fund, having, in his favor, a lien upon the surplus, if there shall be any, arising out of the other fund.

The construction we have given the will and the ruling last above made make it proper, if not necessary, to consider the matter of the allowance of the demand of Mary Brown. Assuming that so long as the estate of Cordelia Brown was not formally closed there was a right to a revival of the commission on claims (*Hart* v. *Shiawassee Circuit Judge*, 56 Mich. 592; *Quinn* v. *McGovern*, 97 Mich. 114; *Heavenrich* v. *Nichols' Estate*, 113 Mich. 508), we are all of opinion that, whatever effect it may have to preserve the lien of the mortgages, payments of interest by the executor did not operate to suspend the running of the statute of limitations in favor of the estate. This ruling is required by the provisions of the statute, sections 9375, 9380, 3 Comp. Laws, and the effect given them by previous adjudications. See *Durfee* v. *Abbott*, 50 Mich. 278, 283; *Fish* v. *Morse*, 8 Mich. 34; *Benjamin* v. *Early*, 123 Mich. 93; *Clark* v. *Davis*, 32 Mich. 156; *Church* v. *Holcomb*, 45 Mich. 29, 38; *McGee* v. *McDonald*, 66 Mich. 628; *Sperry* v. *Moore's Estate*, 42 Mich. 353.

Counsel for Mary Brown contend that upon the authority of *In re Lambie's Estate*, 94 Mich. 489; *Russell* v. *Wheeler*, 129 Mich. 41; *Long* v. *Landman*, 118 Mich. 174; *Houghteling* v. *Stockbridge*, 136 Mich. 544, a dif-

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ferent ruling should be made. Upon a review of these cases we are satisfied that none of them support the contention that an administrator or executor may, by payment of interest upon demands against the estate, either revive a demand barred by the statute at the decease of the debtor or admit the liability of the estate upon one otherwise barred by the statute. The law has not been settled uniformly in different jurisdictions. The policy of our law, as declared in the statutes and by this court, is to commit allowance of claims against estates to a commission, to refuse allowance of demands barred by statute and to confine the administrator to payment of demands duly allowed. Action upon Cordelia's note was barred by the statute in 1897. *Morse* v. *Hayes*, 150 Mich. 597. It was presented for allowance in February, 1905.

For the reasons given, the decree of the court below will be modified to accord herewith. The modification is substantial and appellant will recover costs of this appeal from Henry D. Brown and Mary Brown. An injunction will issue to restrain Mary Brown from further prosecuting her claim against the estate.

MONTGOMERY, HOOKER, CARPENTER, and MCALVAY, JJ., concurred.

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PEASE *v.* WARNER.

1. MORTGAGES — CONVEYANCE BY MORTGAGOR — ASSUMPTION OF DEBT BY GRANTEE—EFFECT—PRINCIPAL AND SURETY.
   Where a mortgagor conveys the mortgaged premises to a grantee who assumes the mortgage debt, the grantee becomes, as to the grantor, the principal debtor, and the grantor is his surety.

2. COVENANTS — OPERATION — RUNNING WITH LAND — COVENANT AGAINST INCUMBRANCES.
   In this State a covenant against incumbrances is personal and does not run with the land.

3. SAME—ACTION FOR BREACH—CONVEYANCE—EFFECT.
   A right of action for breach of the covenant against incumbrances does not pass by deed of the land.

4. SAME — MORTGAGES — FORECLOSURE — RIGHTS OF SUBSEQUENT GRANTEE.
   If a covenant against incumbrances in a deed which excepts a certain mortgage, "to be paid on or before five years from" the date thereof, can be construed as a covenant that the mortgage cannot be foreclosed before that time, such covenant will not run with the land, and a subsequent grantee, taking from one who assumed the mortgage debt, cannot, on a bill by the mortgagee to foreclose for a default in the payment of interest agreed to be paid by the mortgagor, have specific performance of the covenant in the mortgagor's deed, by compelling him to satisfy the mortgagee's claim, and await the expiration of the five years before foreclosing. GRANT, C. J., and MONTGOMERY, J., dissenting.

Appeal from Calhoun; North, J. Submitted October 25, 1907. (Docket No. 144.) Decided June 27, 1908.

Bill by George H. Pease against Ben F. Warner, Charles W. Jewett, Anna M. Jewett, and Amariah F. Freeman to foreclose a mortgage. From a decree for complainant, defendant Freeman appeals. Affirmed.

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John C. Patterson, for complainant.

F. M. Freeman (*Robert E. Bunker*, of counsel), for defendant Freeman.

H. W. Cavanagh, for defendant Warner.

On March 2, 1905, defendant Warner executed a mortgage to complainant upon four pieces of real estate owned by him. One was a part of a lot in the village of Homer, with a building thereon, the other three pieces were farm property consisting in all of 110 acres, one of which is Mr. Warner's homestead. The mortgage was for $6,000, payable in installments, running from one to eight years from date.

On January 25, 1906, Warner sold and conveyed the village property to defendants Jewett. That deed contained the following:

"This deed is given subject to one mortgage of six thousand dollars, which second party agrees to assume as part of the above considerations to be paid on or before five years from date March 2, 1905. First party retains the use of said described property until March 2, 1906.

"All interest and taxes to be paid to March 2, 1906.

"Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining; to have and to hold the said premises as herein described with the appurtenances unto the said parties of the second, and to their heirs and assigns forever: And the said party of the first part for himself, his heirs, executors and administrators, does covenant, grant, bargain, and agree, to and with the said parties of the second part, their heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seised of the above granted premises in fee simple; that they are free from all incumbrance whatever and that he will, and his heirs, executors and administrators shall warrant and defend the same against all lawful claims whatsoever, excepting the six thousand dollar mortgage heretofore stated."

On May 17, 1906, defendants Jewett conveyed said village property to defendant Freeman. The Jewetts covenanted in that deed that the lands are free from all incumbrance whatever except a mortgage thereon for $6,000,

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given by one Ben F. Warner, former owner of said premises, to one George H. Pease, interest being paid thereon to March 2, 1906. The land was subject to the mortgage. This village property was exchanged for some property in the village of Manchester, Washtenaw county, owned by Freeman. Jewett represented to Freeman that the interest was paid to March 2, 1906, that it would run five years before it would mature, and that all that Freeman would be required to do during that time would be to keep up the interest on the mortgage. The amount of the mortgage was deducted from the purchase price. The Jewetts produced a certified copy of the deed from Warner to them and exhibited it to Freeman in corroboration of their statement. Neither the mortgage nor a certified copy was produced to Freeman. He purchased in reliance upon the representations made in the deed as to the terms of the mortgage. The statements were untrue in three particulars: (1) It was payable in yearly installments. (2) It was to run eight years instead of five. (3) The whole became due upon the failure to pay the interest, etc.

Complainant filed the bill to foreclose the mortgage, alleging a default in payment of the first installment of principal and interest, due March 2, 1906, his election to declare the entire amount due, and setting forth the above conveyance, and making the parties thereto defendants. Defendant Warner answered and filed a cross-bill, claiming that the village property sold to and now owned by defendant Freeman should first be sold in payment of the mortgage debt.

The court entered a decree of foreclosure, decreeing that defendant Freeman's land should be sold first to satisfy the sum of $6,367.21, the amount due on said mortgage debt, less $316.29, which was interest due March 2, 1906, and was unpaid at the time of the deed from Jewetts to defendant, and that Warner's lands be sold to satisfy the sum of $316.29, which was due March 2, 1906, and unpaid.

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GRANT, C. J. (*after stating the facts*). It is conceded that complainant is entitled to a decree of foreclosure. The sole controversy arises between Freeman and Warner. The representations made by Warner in his deed to the Jewetts were untrue. It is immaterial whether they were intentionally or thoughtlessly made. Did defendant Freeman have a right to rely upon them? He had a right to rely upon these deliberate and written representations. The law does not permit one to escape the consequences of his untruthful statements by saying to him who has relied upon them: "You might have made further inquiry and ascertained that my statement was untrue." *Holcomb* v. *Noble*, 69 Mich. 399; *Krause* v. *Cook*, 144 Mich. 365.

The court below held that he did have such right so far as the representation of the amount due thereon was concerned, but not as to the date when the mortgage would fall due. If Freeman had a right to rely upon one representation he had a right to rely upon all. He was under no more obligation to make further investigation upon one point than upon the other. If the representation in the deed had been truthfully made, undoubtedly, under the authorities, as well as in reason, the village property, owned by Freeman, should first be sold, because he purchased the property subject to the mortgage, and the amount was deducted from the purchase price.

Time appears to have been valuable to defendant Freeman. The testimony is clear that he would never have made the purchase had he known that the entire mortgage was then due at the option of the mortgagee. He desired time to dispose of the property, and, under the solemn representation of Warner in his deed, there were five years in which he was only required to pay interest annually at five per cent. Warner's contract with the Jewetts, his grantees, was that the mortgage had five years to run from March 2, 1905. This contract was a covenant. Was it personal, or does it run with the land? If the complainant, as he might have done, had collected

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the note from Warner, Warner would have been subrogated to all the rights of complainant. Could he have foreclosed the mortgage against the Jewetts in violation of his contract and covenant with them that the principal of the mortgage had five years to run? Could he have compelled payment by the Jewetts before March 2, 1905? It appears to me that these questions must be answered in the negative.

Are Jewett's rights under his contract with Warner assignable? Where a grantor covenanted to warrant and defend the land against all claims except an incumbrance of $1,600, and the incumbrance was in fact $1,900, it was held that it was a covenant running with the land. *Johnson* v. *Hollensworth*, 48 Mich. 140. The court, speaking through Justice COOLEY, said:

"There is no fixed or essential form for any covenant. A covenant is merely a promise under seal, and to ascertain what it is in legal import we have only to see what the promissor has undertaken for; in other words, what is the legal interpretation of the language in which the promise is expressed."

What difference in principle is there in covenanting that the incumbrance is a certain amount, and covenanting that the certain amount is all due at a certain time? Under defendant Warner's theory, if the mortgage had been $10,000 instead of $6,000 as covenanted, his grantee would have been relieved of the payment to him of the excess, though compelled to pay the full amount to the mortgagee; but if he had covenanted that the mortgage was due in ten years, when in fact it was due in one, that would have been a personal covenant and would not have run with the land. Under this contention, Warner, having paid the mortgage, could not bring suit against his grantees, the Jewetts, but could bring suit for foreclosure against Jewetts' grantee or any subsequent grantee. I see no logic in such a distinction. The Jewetts are not damaged. The subsequent grantee is. It is said by Chancellor Kent (4 Kent's Commentaries, p. 472):

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"He [the subsequent grantee] is the most interested and the most fit person to claim the indemnity secured by them [the covenants], for the compensation belongs to him as the last purchaser and the first sufferer."

In *Smith* v. *Lloyd*, 29 Mich. 382, the mortgage covenanted against was one for $7,300, which was the amount of the principal. There was accrued interest, but the court held that it was a covenant not descriptive of the mortgage but of the amount of the existing incumbrance. Justice CHRISTIANCY in that case said:

"When the grantor covenants against all incumbrances, and to warrant and defend, 'except as to a certain mortgage of seven thousand three hundred dollars, made by the parties of the first part to Margaret Davidson, et al.,' it is certainly, to my mind, a much more natural inference that the sum was intended to be mentioned as the then existing amount of the incumbrance, and so understood by the parties (certainly by the purchaser), than that the entire clause in which the mortgage is mentioned was intended merely as matter of reference or a description of the mortgage by the statement of the sum for which it was originally given, which would leave the purchaser to find out at his own risk what the amount was."

In *Security Bank* v. *Holmes*, 65 Minn. 531, it is said:

"It is immaterial whether we say that a covenant against an incumbrance which is a money charge on the land runs with the land, or that the cause of action for a breach of the covenant is assignable, and passes by deed to the grantee of the covenantee, immediate or remote, who sustains injury by reason of the incumbrance; for in either case we reach the same result. The covenant, which is one of indemnity, in effect attaches itself to the title assumed to be conveyed by the deed, and accompanies it for the protection of the covenantee or any of his assigns who may finally be injured by the incumbrance. In short, for all practical purposes, a covenant against incumbrances which are a money charge on the land runs with the land until they are discharged."

A covenant as to the time when an incumbrance becomes due may be more disastrous to a purchaser than a

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covenant falsely representing the amount. One may be willing and able to purchase and pay for land where he has five years in which to pay an incumbrance, but would not purchase if he must pay in one year. I can see no difference in principle between a covenant as to amount and a covenant as to time.

It is equitable and just that Warner should, if he can, make these representations good. Freeman is not seeking to avoid the ultimate liability of his land for the debt. The purchase price was $9,500. Under the decree the defendant is required to pay $6,000 five years before, under Warner's representations, he would be required to. Warner should make good his deliberate representations if it is in the power of a court of equity to compel him to do so. We think it is. If he pays the mortgage debt he is subrogated to the lien upon the defendant's land, and at the end of five years can foreclose, and before, should Freeman fail to pay the annual interest. Warner, and not Freeman, is responsible for this unfortunate state of affairs. The party responsible should suffer the inconvenience, and, if necessary, ultimate loss. Warner should be allowed the privilege of paying the mortgage, which he can do at any time, and take an assignment thereof to himself. In this way he will suffer no loss. If he cannot procure the money, then his own lands must be sold first, and in that event he will be subrogated to the mortgage lien upon the property. Such a decree does exact justice, compels Freeman to pay according to his agreement, and secures Warner from loss.

The decree should be reversed, and decree entered in this court in accordance with this opinion, with the costs of both courts.

MONTGOMERY, J., concurred with GRANT, C. J.

OSTRANDER, J. I am not able to agree with the conclusions stated in the opinion of the Chief Justice. The mortgage in question was made payable according to a certain note. The terms of the note were that $300 of

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principal should be due each year for three years, $500 the fourth year, $500 the fifth year, with the privilege of then paying in full. If there was any unpaid principal after the fifth year, it became due eight years after the date of the mortgage, which was March 2, 1905. Only $1,900, it is seen, fell due during the first five years. If no more was paid, the remaining $4,100 fell due at the end of eight years. The alleged misrecital or misleading description of this mortgage contained in the deed made by the mortgagor to Jewett consists of the words "to be paid on or before five years from date March 2, 1905," found in the sentence:

"This deed is given subject to one mortgage of six thousand dollars, which second party agrees to assume as part of the above consideration to be paid on or before five years from date March 2, 1905."

Succeeding this sentence are the following:

"First party retains the use of said described property until March 2, 1906. All interest and taxes to be paid to March 2, 1906."

The deed does not otherwise contain any description of the mortgage. It is silent as to rate of interest, time of interest payments, requirements that the taxes and the insurance premiums shall be paid, the conditions precedent to foreclosure. Reference to the instrument, or to the record thereof, and to the note or the acceptance of a parol statement of its terms was necessary if a purchaser desired information. It is a condition of the mortgage that interest shall be paid annually at the rate of five per cent., and that if any default is made in the payment of the interest and it remains unpaid for 60 days, the mortgagee, at his option, may declare and treat the whole indebtedness as due and payable and may foreclose the mortgage. There are like conditions with respect to taxes and insurance premiums. If an installment of principal becomes due and is not paid, foreclosure of the mortgage for such past due installment may be begun. What actually occurred

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was that neither the interest falling due March 2, 1906, nor the first installment of principal, was paid. It was more than 60 days overdue when defendant Freeman accepted his deed. The mortgagee declared the whole amount of the mortgage to be due and instituted this suit. Defendant Warner, in his deed to Jewett, promised to pay this installment of interest. Jewett, in his deed to Freeman, represented that it had been paid. Freeman accepted these assurances and without further inquiry purchased the property. He accepted from his grantor a covenant to warrant and defend against all lawful claims except a mortgage—

"For six thousand dollars given by one Ben F. Warner, former owner of said premises, to one George H. Pease, interest being paid thereon to March 2, 1906, * * * second party taking said premises by this deed subject thereto."

By his transfer of a portion of the mortgaged property to Jewett, subject to the entire mortgage debt, Jewett assuming the mortgage as a part of the consideration, Warner, as between himself and Jewett, paid the mortgage. Jewett became, as to Warner, the principal debtor, and Warner his surety. *Crawford* v. *Edwards*, 33 Mich. 354; *Miller* v. *Thompson*, 34 Mich. 10; *Higman* v. *Stewart*, 38 Mich. 513, 523; *Corning* v. *Burton*, 102 Mich. 86. And see *Hicks* v. *McGarry*, 38 Mich. 667. The mortgagee asks for, and may insist upon, a decree for deficiency against Jewett, who is not contesting. It is defendant Freeman who is insisting that the property shall not be immediately devoted to the payment of the mortgage. It is his theory that he is entitled to have a sale of the premises deferred, upon payment of the interest, until five years after March 2, 1905, because in the deed from Warner to Jewett the property was not sold subject to a mortgage due, or to become due presently, but subject to one falling due on or before five years from March 2, 1905.

It is to be noticed that no fraud on the part of Warner

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is charged or attempted to be proved, and, further, that the Chief Justice, in his statement of the case and in the reasoning employed, does not rely alone upon the alleged misdescription of the mortgage in the Jewett deed, but upon that and an omission to state in the deed that the mortgage contained what is known as an interest clause. The conclusion, therefore, involves the proposition that if one deeding land incumbered by a mortgage against which he refuses to covenant, and which the grantee assumes, sets out in his deed any of the terms of the mortgage, he must also set out any qualifying terms of those terms or be responsible as for a misrepresentation by concealment; and the further proposition that a subsequent grantee of the equity of redemption, who does not assume the debt, who has accepted a different contract and covenant concerning the same subject-matter, and who buys expressly subject to the mortgage, may have, in effect, specific performance of the representation, or the covenant, of his remote grantor. Conceding, for the purposes of argument, that courts of equity have jurisdiction to compel specific performance of such a covenant (see, generally, Rawle on Covenants for Title [5th Ed.], §§ 358-369), the opinion is consistent only if reliance is placed upon the fact that the deed did not state that if the interest on the mortgage was not paid, the whole sum secured might be declared to be due and immediately payable, because the trouble arises, not on account of the alleged misrecital in the deed, but because the interest was not paid. So far as any actual default on the part of Warner is concerned, the same situation would exist if the description given corresponded with the terms of the mortgage. The mortgagee might or might not have foreclosed his mortgage for the installment of principal falling due. Freeman might have been willing to pay the annual installments of principal, even though he did not suppose that any of the principal fell due until 1910. In any event, there could be no present demand for the whole debt if the interest had been paid.

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By the terms of the mortgage, some of the principal was to be paid before, and all of it could be paid at the end of, five years. It is said the language employed in the deed was a representation, or a covenant, or both, that it was due on or before five years from its date and that the expression "to be paid" on or before a certain date means, in common usage, that it fell due on the date named and was payable earlier at the option of the payee. It is not claimed that the expression was not understood by Jewett, the grantee, or that he did not know all of the terms of the mortgage. When we consider that deeds of conveyance are prepared after the bargain has been made, and that all scriveners do not, with nicety, express the contract, I think it should not be said that the particular expression so plainly means, what it is now contended that it means, that Mr. Freeman was entitled to rely upon his interpretation of it and to bind Mr. Warner thereby.

If the interpretation of the language contended for by appellant is admitted, there was no representation that the mortgage did not have an interest clause, or a tax or insurance clause, unless by construction it is held that the ambiguous words of description referred to have a meaning which excludes the idea that there could be a foreclosure for a greater sum than the unpaid installments of interest. Such a construction, in a court of equity, for the alleged purpose of doing equity, would be a refinement in itself inequitable.

In dealing with this case, it is a mistake to proceed as if Freeman occupied, in fact or in law, the position of Jewett. He does not. Jewett, in fact, promised to pay the incumbrance. Freeman is under no obligation to do so. If it were a question of mere equities, application of the fund should in no case be postponed except upon condition that Freeman become responsible for the payment of the mortgage. As matter of law, so far as defendant Freeman is concerned, there is no property subject to the mortgage except the property in which he purchased the

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equity of redemption. The argument made for him in this case would as well secure him the right to a specific performance of the covenant if the mortgage conveyed no other property. The method of relief proposed may be convenient, if relief is to be given, but it is not a case for contrasting mere equities. The question which precedes all others is whether defendant Freeman is entitled to any relief. A court of equity will not enlarge his rights. The conveyance of land by virtue of which he is here at all is expressly qualified. The qualification has been recited. He knew that Jewett, his grantor, had assumed the mortgage. His deed contains no reference to any right of action which Jewett had against Warner for the breach of the covenant against incumbrances; a right which, if ever, accrued before Freeman purchased. In this State, a covenant against incumbrances is personal and does not run with the land. *Davenport* v. *Davenport's Estate*, 52 Mich. 587; *Lovejoy* v. *Potter*, 60 Mich. 95, 101; *Matteson* v. *Vaughn*, 38 Mich. 373; *Guerin* v. *Smith*, 62 Mich. 369. This is the rule in most jurisdictions. 11 Cyc. p. 1087. The grantee in a deed must make his own contract against incumbrances with his grantor and look to him for indemnity if he is obliged to pay money or otherwise relieve from an incumbrance not excepted in his deed. This court has never made a contrary ruling. The case of *Post* v. *Campau*, 42 Mich. 90 (see *Davenport* v. *Davenport's Estate*, supra, for comment), and the case of *Johnson* v. *Hollensworth*, 48 Mich. 140, are neither of them authority for an opposed doctrine. *Smith* v. *Lloyd*, 29 Mich. 382, was an action for breach of the covenant against incumbrances and is authority (p. 385) for the proposition that the covenant is broken, if ever, when made. Nor is this latter case opposed in principle to *Shanahan* v. *Perry*, 130 Mass. 460.

A right of action for breach of the covenant does not pass by deed of the land. *Guerin* v. *Smith*, *Davenport* v. *Davenport's Estate*, supra; *Norton* v. *Colgrove*, 41 Mich. 544. Defendant Freeman, therefore, has not suc-

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ceeded to any of the rights (assuming the contract against incumbrances in the deed from Warner to Jewett to be breached) which defendant Jewett possessed. The court below required Warner to pay the interest upon the mortgage for the first year, not upon the ground that Freeman had the right to rely upon any representation in the deed from Warner to Jewett, but because upon the face of the contract Warner agreed to pay it and in terms made the property the primary fund to pay only the mortgage and the interest, etc., accruing after the first year. Whatever the injustice to Mr. Freeman may seem to be, I conclude that upon the authority of our own decisions we are required to say that a covenant against existing incumbrances does not run with the land, that no right accruing to his grantor passed to Mr. Freeman, and upon reason that he had no right, legal or equitable, to rely upon the description of the mortgage or upon the representations or the covenant made by Warner. The decree should be affirmed, with costs to defendant Warner.

BLAIR, HOOKER, MOORE, CARPENTER, and MCALVAY, JJ., concurred with OSTRANDER, J.

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BUTTERS v. BUTTERS.

1. JUDICIAL SALES—SETTING ASIDE—CHANCERY JURISDICTION.
A court of chancery has inherent power to set aside sales made by its order, whether the property is bid in by a party to the suit or by a stranger.

2. SAME—CHANCERY SALES—PRACTICE.
Chancery practice requires every sale to be reported to the court and an order confirming it.

3. SAME—SETTING ASIDE—REMEDY.
Where it is sought to vacate an order confirming a chancery sale and to obtain a resale of the property, the manner of bringing a grievance to the attention of the court is not of particular importance so long as new rights have not intervened and the original parties to the suit and the purchaser have notice and opportunity to be heard.

4. SAME—PETITION—SUFFICIENCY.
Where, on a petition to open a chancery sale, an affidavit of the non-residence of the purchaser was made, an order for his appearance was made and published, and it appears that he had notice of the proceeding, no reason appears to deny the power of the court to determine the matter presented by the petition upon the merits, if complainant was within the jurisdiction of the court.

5. JUDGMENT—RES JUDICATA—DECISION NOT ON MERITS.
A former adjudication of the matters put in issue by an original bill to set aside a chancery foreclosure sale does not appear where the former proceeding was by petition in the foreclosure suit which was dismissed because not the proper remedy.

6. SAME—MATTERS CONCLUDED.
On a bill to set aside a chancery foreclosure sale, filed by the divorced wife of the mortgagor, complainant's claims of homestead rights in one of the lots, and of a right to have the other first sold, do not commend themselves to the court, where such claims were not presented in the foreclosure suit, and complainant is claiming rights based upon a deed subsequently given her by her husband in settlement of their property rights.

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7. MORTGAGES—FORECLOSURE—SALE—SEVERAL PARCELS—SEPARATE SALE—NECESSITY.

Whether Act No. 200, Pub. Acts 1899, requires lands sold under the usual decrees made by courts of chancery to be sold in parcels, will not be determined in a case in which it appears that though two lots were sold as one parcel, and that there were two houses and a barn thereon, one of the houses stood upon both lots, and a portion of one of the lots had been otherwise used with the other lot.

8. SAME—COMMISSIONER'S DEED—FILING—DELAY—EFFECT.

A chancery foreclosure sale will not be set aside because the commissioner's deed was not filed in the office of the register of deeds within 20 days, as required by Act No. 200, Pub. Acts 1899, since the files and records in the office of the register in chancery furnish the most complete information upon the subject.

9. SAME—COLLUSIVE FORECLOSURE—EVIDENCE—SUFFICIENCY.

On a bill by a divorced wife to set aside a chancery foreclosure sale of lands upon which she had joined with her husband in giving a mortgage, evidence examined, and *held*, not to show such collusion between the husband and his brother, who purchased at the sale, as would justify setting aside the sale and allowing the complainant to redeem.

Appeal from Wayne; Donovan, J. Submitted January 8, 1908. (Docket No. 11.) Decided June 27, 1908.

Bill by Janet Butters against George Butters and Adam Butters to set aside a sale under foreclosure proceedings. From a decree dismissing the bill, complainant appeals. Affirmed.

Charles C. Stewart (*Ronald Kelly* and *William S. Thomas*, of counsel), for complainant.

Henry C. Walters, for defendant George Butters.

The bill was filed in December, 1905, or January, 1906, to set aside a sale of premises made in foreclosure proceedings under a decree of July 1, 1902. The sale took place September 13, 1902. The grounds of relief stated are (1) that the premises should have been, and were not,

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sold in parcels; (2) that the commissioner's deed was not recorded until after the statutory period of redemption had expired. It is prayed also that the commissioner's deed may be held to operate as an assignment of the mortgage and the decree of foreclosure, that an accounting of the rents and profits of the real estate may be taken, and that after such accounting a decree be made for a sale of the premises, this bill be treated as a bill to redeem, and if complainant pays the amount found to be due she may be subrogated to the rights of the mortgagee and authorized to sell one of the parcels to reimburse herself under a certain agreement made with defendant Adam Butters. Defendants have filed separate answers and defendant George Butters also filed a plea of former adjudication of all matters now put in issue. Adam Butters is the husband of complainant, George Butters is Adam's brother. In December, 1895, Adam owned lots numbered 264 and 265, at the corner of Magnolia street and Fourteenth avenue, in the city of Detroit. Lot 264, as occupied, encroached, in fact, upon lot 265, the house thereon standing partly upon lot 265. The mortgage in question was executed by Adam and complainant, his wife, December 23, 1895, conveyed both parcels of land by legal description, and it secured payment of $2,000 in two years and interest at six per cent. The mortgagors were, with their children, then occupying the parcel known as lot 264. The foreclosure bill was filed October 7, 1901, the mortgagors were made defendants and were served with process. Complainant appeared by her solicitor, did not answer, and the bill was taken as confessed. The property was sold as one parcel to defendant George Butters, who was a judgment creditor of his brother and had levied upon the mortgaged premises, for $2,253.71, which was the amount decreed to be due. He was represented at the sale (he was not present, and is resident in Canada) by his attorney, to whom manual delivery of the commissioner's deed was made. The deed was not recorded in the office of the register of deeds un-

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til March 23, 1903. During the period allowed by law for redemption, complainant, by her solicitor, visited the office of the register of deeds, made inquiry and was informed that the deed was not a matter of record at the office. No tender was made. She never proposed to redeem more than lot 264. Later (July 16, 1903), complainant filed a petition in the foreclosure suit to set aside the sale, upon the ground that the property should have been sold in parcels, that the deed was not recorded in due season, and that there was fraud and collusion on the part of defendants to deprive her of rights. There was an affidavit of the non-residence of George Butters, an order for his appearance was made and was published. He did not appear except specially to move to set aside an order setting aside the sale. Relief was finally denied October 26, 1905. Whatever force and effect the order dismissing the petition had, it still has; it has not been set aside. When the mortgage was executed, lot 265 was worth, it is claimed, $4,500 and lot 264, $2,500, and that complainant was induced to sign the mortgage on the representation and understanding that in case a foreclosure occurred lot 265 must be first sold. In October, 1901, complainant filed her bill against her husband to obtain separate maintenance and after a contest a decision in her favor was made, on or about November 6, 1902, by which she was, among other things, given lot 264, subject to $1,000 of the incumbrance. Negotiations between the parties ensued, resulting in a settlement, made November 17, 1902, by the terms of which lot 264 was to be and was deeded to complainant, and she released to Adam her dower right in lot 265, Adam covenanting to pay and discharge all liens, including the mortgage, upon lot 264. The suit for separate maintenance was discontinued, no decree having been entered. One of the instruments made and signed at this time is here set out:

"This indenture, made this seventeenth day of November, 1902, between Adam Butters and Janet Butters, both of Detroit, Michigan, witnesseth, that whereas said par-

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ties in pursuance of an agreement of settlement between them, have this day exchanged deeds, whereby the fee of lot 264, private claim 726, is conveyed to said Janet Butters, and lot 265 of the same subdivision is conveyed to said Adam Butters, free of dower of the part of said Janet Butters, and whereas, the said parties have agreed that it is desirable that said lots be held together and not sold separately, or without the consent of both parties, now, therefore, the said parties hereby mutually covenant and agree, each with the other, that neither will without the other's consent in writing, at any time during their respective lives, or before the death of one or the other, sell or offer for sale either of said lots, without first giving the other of said parties the opportunity to purchase the same upon the same terms, it is further agreed as a part of the settlement above referred to, that in case the said Adam Butters shall fail to pay the interest and principal of the mortgage and lien referred to in the annexed agreement, the said Janet Butters, upon making any payments on account thereof, shall be deemed subrogated to all the rights of said mortgagee against said Adam Butters.

"In witness whereof, said parties have signed this agreement, the day and year first above written."

It is asserted by Adam, and denied by complainant, that a part of their understanding and agreement was that marital relations were to be resumed. Complainant charged that her husband, proposing and endeavoring to defraud her, enlisted his brother's aid, and that the judgment procured by George against Adam, the levy, the sale of the property in a single parcel, are events in the collusive undertaking. Within six months after the sale, complainant saw George Butters and without success sought an arrangement which would permit her to mortgage for $1,000, and so redeem, lot 264 from the foreclosure. Adam, after deeding the property to his wife, collected rents from lot 264 and, for a time, sent them to complainant. Refusing then, or neglecting, to send them, she appointed an agent who notified the tenant to thereafter pay him the rent. It was claimed by the tenant, when demand was next made for rent, that Adam had forbidden payment to the agent. Summary proceedings

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to oust the tenant followed. From a judgment of ouster, an appeal was taken to the circuit court where the judgment was affirmed. It was after Adam had refused to send her the rent money that complainant interviewed George Butters, showed him the deed from her husband, and asked him to permit her to burden her property as has been stated. It was after his refusal of her request that she arranged for a loan from a person in Detroit, who upon examination failed to find the commissioner's deed recorded. He wrote to George Butters about the matter, after which the deed was found and recorded. It was not proposed to redeem all of the property, but lot 264 only. Upon learning the facts, the proposed lender of the money was of opinion that the deed was void.

OSTRANDER, J. (*after stating the facts*). As the record before us is understood, the petition (it seems also to have been called a bill) of complainant to set aside the foreclosure sale contained, in substance, the same averments found in the bill now filed. It was answered by Adam Butters. George Butters was made a party and being then, and now, a resident of Canada, an order for his appearance was made and duly published and he appeared and moved to dismiss the petition upon the ground that an original bill should have been filed, since the purchaser at the foreclosure sale was not a party to the foreclosure suit. The order made in that matter, dated October 23, 1905, reads:

"This matter came on to be heard on application to dismiss the petition filed by the defendant, Janet Butters, on the 16th day of July, 1903, to set aside the foreclosure sale under the mortgage referred to in the complainant's bill of complaint, had on the 13th day of September, 1902, and all the persons interested in said application being present in court and represented by their respective counsel, and the court having heard the arguments of said counsel; ordered that the said petition be and it hereby is, dismissed, without costs."

Counsel for Mrs. Butters in that proceeding testified

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in the case at bar that they were convinced that they had mistaken their remedy and supposed an order would be entered so stating. It would appear that the case of *Crawford* v. *Tuller*, 35 Mich. 57, was regarded as decisive of the question. It appears, also, that the complainant in the foreclosure suit was beyond the jurisdiction of the court and she had the money paid by the purchaser at the foreclosure sale. See, also, *Bending* v. *Auditor General*, 137 Mich. 500; *Jewett* v. *Morris*, 41 Mich. 689. It will be noticed that in all of these cases the decree was attacked and sought to be set aside. In the case at bar, the decree is not attacked. A court of chancery has inherent power to set aside sales made by its order whether the property is bid in by a party to the suit or by a stranger. Indeed, the practice requires every sale to be reported to the court and an order confirming it. And if it is sought to vacate a confirming order and to obtain a resale of property, the manner of bringing a grievance to the attention of the court is not of particular importance so long as new rights have not intervened and the original parties to the suit and the purchaser have notice and opportunity to be heard. In the matter of the petition to open this sale, an affidavit of the non-residence of the purchaser was made, an order for his appearance was made and published, and that he had notice of the proceeding is evident. No more has been done in the pending case. There does not appear to be any reason to deny the power of the court to determine the matter presented by the petition upon the merits, if complainant was within the jurisdiction of the court. But if she was not, and if that was a ground for refusing relief, it is singular that, having now pursued the method of filing an original bill, the complainant in the foreclosure suit should not be made a party defendant. We shall assume that the matter of the petition to set aside the sale was not determined on the merits and that the plea was properly overruled.

The case affords abundant evidence of the wisdom of

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the rules which require parties to litigation to use the opportunities afforded them to assert their rights, to discover and promptly inform the courts of irregularities. We are not impressed with the testimony introduced to show that when the mortgage foreclosure was begun, complainant had homestead rights in lot 264. She is now asserting rights based upon her deed of the lot. But if she claimed such rights she should have presented the claim in the foreclosure case and this is true, also, of her right, if she had it, to have lot 265 first sold to satisfy the mortgage. Before and during the period of the foreclosure proceeding, complainant and her husband were adversaries. She sought to have allowed to her a portion of this property. Lot 264 was awarded her, subject to a lien of $1,000. Her divorce suit was pending in the same court which had jurisdiction of the foreclosure suit. It does not appear that the judge who allowed her alimony had his attention called to the fact that a sale of the premises occurred two months earlier. The purchaser, a stranger to the foreclosure suit, had bid in the property and paid the mortgage indebtedness. And complainant did not accept the provision made for her by the court. Instead, she accepted a deed from her husband of lot 264 and his covenant to pay the liens thereon. Both her deed and her husband's separate undertaking recited the fact that George Butters was then the lien holder, and that both lots were subject to these incumbrances. Becoming satisfied later that her husband did not propose to protect her, she set about securing lot 264 discharged from the incumbrances, first by application to George, later by borrowing money to redeem her own lot from the foreclosure sale. It does not appear that she ever intended to redeem lot 264 from the levy.

It is contended that the sale was void. We need not inquire whether Act No. 200, Pub. Acts 1899, requires lands sold under the usual decrees made by courts of chancery to be sold in parcels, making the decisions of this court in *Lee* v. *Mason*, 10 Mich. 403; *Udell* v. *Kahn*.

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31 Mich. 195, applicable to such sales, because it does not appear that if the sale had been made in a statutory foreclosure proceeding it would have been void. It is true that there are two lots and two houses and a barn, but one house stands upon both lots, and a portion of lot 265 has been otherwise used with lot 264. Undoubtedly the court might have made a subdivision of the property and provided in the decree for a sale of each subdivision. It did not do so and was not asked to do so. Nor was the court in the divorce proceeding asked to make boundaries of the property, although in the decision made the description was not inserted. The agreement, herein set out, made after the sale, indicates the desirability of a single ownership and holding of the property. Counsel for complainant ask in the brief that defendant George Butters be required to deed to complainant lot 264 as occupied, she paying for a portion of lot 265 at a price to be fixed. When the property was sold, both houses were tenanted. The testimony tends to prove that the conditions were discovered on the day of the sale and that in view of them the commissioner sold the property as one parcel.

The deed, by inadvertence, was not recorded within the period of redemption, and it is contended that this fact and the provisions of Act No. 200, Pub. Acts 1899, bring the case within the rule of *Doyle* v. *Howard*, 16 Mich. 261. The reasons given in the opinion in that case for holding the provisions of the statute to be mandatory apply, some of them, with equal force in case of a chancery foreclosure. But the principal and controlling reasons do not apply. Foreclosure proceedings by advertisement are confined to cases in which the mortgage contains a power of sale. The proceedings are wholly ex parte and non-judicial. The office of the register of deeds may be the only place where an interested person may learn whether a sale has been made and of the terms thereof. A chancery foreclosure is a judicial proceeding. There is

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other written evidence of the sale than that afforded by the deed. The files and records in the office of the register in chancery furnish the most complete information upon the subject. Judicial confirmation of the sale is required and this may be denied after the deed has been filed with the register in obedience to the statute. *Trombley* v. *Klersy*, 147 Mich. 370. Parties to the suit who have been served with the process of the court are permitted and expected to file objections to the report of sale and bring them to the attention of the court. It is not probable that anyone would attempt to redeem from such a sale without acquiring the knowledge disclosed by the record in the foreclosure suit. And one desiring and having the right to redeem, finding no deed of record and unable to reach the accredited purchaser, could protect himself by the information easily accessible, either by a deposit of the necessary amount, or by a proceeding in the court having jurisdiction of the matter. The statute procedure should be followed and it is unnecessary to indicate here the consequences of disobeying it further than this, that one who is a party to the foreclosure suit, who has been neither deceived into inaction nor prevented from redeeming, may not rely upon such disobedience for the purpose of securing a resale of the property. In saying this, we necessarily decline to apply the rule of the case cited to chancery foreclosures. We are of opinion that we have no authority to set aside the sale either because the property was not sold in parcels or because the deed was not filed in the office of the register of deeds.

As to the alleged collusion of Adam and George Butters. The testimony does not lead to the conclusion that defendant Adam Butters was not indebted to his brother George, or that the judgment, the basis of the levy, was not regular and legally effective. His good faith is not inconsistent with regard for, reliance upon, and trust in, his brother. It is probable that Adam would prefer that his brother should secure himself rather than that his wife should succeed in securing a part of the property.

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His conduct in dealing with his wife, as it is disclosed by the record, warrants the statement.

The land, all of it, came to Adam from his father, as did the dwelling on lot 265. He is, and for years has been, employed as an engineer at a salary of more than $60 a month. He has no other property. If the domestic problem were eliminated, it is clear that as such matters are usually conducted there need have been no foreclosure of the mortgage. The property was abundant security for the debt, and the income of the husband and the rent of one of the houses furnished money to pay interest. We may assume that if the family relations had remained pleasant, the foreclosure would not have taken place. We may assume, also, that the husband was at fault and the proceeding begun by the wife was a meritorious one. But, as has been pointed out, the debts of the husband and the demands of the wife against the property rendered the value of his resulting equity wholly uncertain. Unless his debts could be again secured, which would have required the consent of complainant, he could not save the property. It does not appear that complainant ever proposed joint action in this behalf. A carefully studied effort on her part to avoid the use of means calculated to secure for herself a portion of the estate could not have been more successful in defeating what the court is now asked to bring about. How she expected her husband to perform the covenant she accepted from him with her deed of lot 264, is not disclosed. He could have performed it by securing the money, if that was possible, as a loan upon a portion of lot 265. Assuming that lot 265, as occupied, is worth $4,500, there would have remained to him an interest in the property worth about $1,000 to be secured only by payment of an annual interest charge of more than $200 and an eventual payment of the principal, or sale of the premises. Complainant, by the same means, would have received premises worth $2,500. It may be said that the legal obligation of the husband required him to attempt to

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pursue the course suggested. That he did not do so is not a ground for divesting the purchaser of his title acquired at the foreclosure sale and ordering a resale of the premises.

While a reading of the record excites sympathy for complainant, it does not make out the case stated in the bill of complaint. We feel obliged to affirm the decree of the court below, with costs to defendant George Butters.

BLAIR, HOOKER, MOORE, and MCALVAY, JJ., concurred.

In re WARD'S ESTATE.

EXECUTORS AND ADMINISTRATORS.

This case is ruled by *In re Ward's Estate*, 152 Mich. 218, between the same parties, and involving the same questions.

Error to Oakland; Smith, J. Submitted January 7, 1908. (Docket No. 2.) Decided June 27, 1908.

Charles W. Ward appealed from an order of the probate court allowing the first annual account of Willis C. Ward, Franklin B. Ward, and George K. Root, executors of the last will and testament of David Ward, deceased. There was judgment disallowing the account in part, and the executors bring error. Reversed.

Chamberlain & Guise (*Elliott G. Stevenson*, of counsel), for appellants.

John H. Patterson (*Watts S. Humphrey* and *H. M. Gillett*, of counsel), for appellee.

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BLAIR, J. This appeal relates to the disallowance by the circuit court of said trustees' first annual account and was heard by the circuit court at the same time as the appeal from the allowance of said trustees' third annual account. Both cases were brought to this court for review and submitted at the same time. The principal brief was filed in the case relating to the third annual account, with the request by both parties that it be considered in this case. The opinion filed April 1, 1908, 152 Mich. 218, necessitates the reversal of this case, and the judgment is, therefore, reversed, with costs, and a new trial granted.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

GROAT *v.* DETROIT UNITED RAILWAY.

1. PLEADING—AMENDMENT—DECLARATION—AD DAMNUM—PROPRIETY.

   Where the statement of the amount in the ad damnum clause of a declaration was inadvertently left blank, an amendment supplying the defect, asked and allowed before the jury was selected, was proper. Section 10268, 3 Comp. Laws.

2. PROCESS—AMENDMENT—SUMMONS—AD DAMNUM—CONFORMITY TO DECLARATION.

   An amendment of the summons in a personal injury case as to the damages claimed, to make it conform to the ad damnum in the declaration, is allowable in the discretion of the court (§ 10268, 3 Comp. Laws), no surprise being claimed, or continuance and terms demanded.

3. DAMAGES—PLEADING AND PROOF—PERSONAL INJURIES.

   A declaration in an action for personal injuries alleging that

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plaintiff was "greatly injured and bruised internally" will permit proof of permanent injuries to the uterus, not otherwise specifically alleged.

4. SAME—PERSONAL INJURIES—EVIDENCE—SUFFICIENCY.
In an action for personal injuries consisting among others, of injury to the spinal cord and nerves, evidence examined, and *held*, that an instruction that there was no evidence of the injuries stated, and that plaintiff was suffering only from a functional and not an organic disorder, was properly refused.

5. SAVING QUESTIONS FOR REVIEW—REASONS FOR RULING—FAILURE TO REQUEST.
Error in overruling a motion for a new trial on the ground of excessive verdict cannot be considered where no reasons were given by the trial court for its ruling and none were requested.

Error to Wayne; Brooke, J. Submitted January 16, 1908. (Docket No. 68.) Decided June 27, 1908.

Case by Catherine Groat against the Detroit United Railway for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Brennan, Donnelly & Van De Mark, for appellant.

Alex. J. Groesbeck and *Edwin Henderson*, for appellee.

MCALVAY, J. Plaintiff recovered for personal injuries which she claimed to have sustained while riding as a passenger on one of defendant's cars when it collided with another of defendant's cars.

There was no dispute in the case upon the question of defendant's liability. The controversy in the case was as to the amount of damages plaintiff under her declaration was entitled to recover. The suit was begun by summons in which the amount of damages claimed was $10,000. The declaration filed later set forth certain specific items for hospital bills, medical attendance and medicines; also loss of wages from inability to work. In the ad damnum clause no other or further sum was named, the space in

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such clause for the insertion of such sum being left blank. Before the trial a motion was made to amend the ad damnum clause by inserting the sum of $25,000 in the blank space in the declaration and also to amend the summons by substituting $25,000 for $10,000 damages as therein claimed. Both amendments were allowed by the court over the objection of defendant and an exception was taken. For this and other errors assigned, defendant by writ of error has brought the case to this court and asks for a reversal.

1. The amendment to the ad damnum clause of the declaration and to the summons was asked and allowed before the jury had been selected. It cannot be claimed that this affected the cause of action upon which suit was brought. The omission to state the amount in the declaration was evidently an oversight and the amendment was clearly allowable under the statute, section 10268, 3 Comp. Laws. To allow the amendment to the summons, to make the damages claimed conform with the declaration, was also, under the same statute and numerous decisions of this court, within the discretion of the trial judge. The record does not show that any surprise was claimed or that a continuance and terms were demanded. The motion was properly granted. *Borden* v. *Clark*, 26 Mich. 410.

2. Complaint is made that the court improperly allowed evidence in the case tending to show permanent injury to the uterus, and also allowed the jury to take this into consideration in determining plaintiff's damages, the claim being that plaintiff's declaration was not sufficiently specific to include such injuries. The plaintiff's declaration alleges among other things:

"That she was greatly hurt, cut, bruised and injured in and about the face, head, body and shoulders and was greatly injured and bruised internally and in consequence thereof and from the effects of which the said plaintiff became and was sick, sore, and lame, disordered and seriously and permanently injured and suffered a permanent

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injury to the spine involving the spinal nerves and the deep fibrous structure of the spine, * * * that by reason of the injuries aforesaid she has * * * suffered great bodily pain * * * and will continue to suffer * * * for the remainder of her lifetime."

It appears from the record that the principal contest in the case was relative to the extent and permanency of the nervous disease from which plaintiff is suffering. That fact would not deprive plaintiff of the right to recover other injury if the evidence objected to was competent and admissible under the declaration. The testimony of the attending physician was positive that this condition of the uterus was "due to results from the injuries she received in the accident." We think the declaration sufficient to warrant receiving the evidence.

In *Montgomery* v. *Railway Co.*, 103 Mich. 46 (29 L. R. A. 287), this court in citing and approving the rule laid down in *Johnson* v. *McKee*, 27 Mich. 471, after distinguishing the latter case from *Shadock* v. *Plank Road Co.*, 79 Mich. 7, and other cases, said:

"It will be seen that the rule thus laid down does not require plaintiff to aver all the physical injuries which he sustained, or which may have resulted from, or have been aggravated by, the tort, even though they do not necessarily result from the original injury. If such injuries can be traced to the act complained of, and are such as would naturally follow from the injury, they need not be specifically averred."

We do not agree with defendant that the injury referred to must be shown to have been the result of the injury to the spine. The injury to the spine and the consequent nervous prostration, and the injury to the uterus were both received at the time the cars collided and plaintiff was struck upon the back by the falling roof of a car. The declaration charges that she was also "greatly injured and bruised internally." The trial court was correct in holding that under the declaration the evidence was admissible.

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Defendant also had every opportunity freely given for a personal examination of plaintiff to discover the injuries from which she was suffering, and its surgeons made such examination long before the trial of the case, therefore no claim of surprise could be made as to conditions then existing.

3. Defendant requested the court to charge that there was no evidence of any injury to the spinal cord or any injury to the nerves themselves; and also that plaintiff was suffering only from a functional and not an organic disorder. These requests were properly refused. There was abundant proof in the case from which the jury could find that the nerves were injured and that the trouble was organic. Dr. Kennedy testified:

"There are probably six or seven of these nerves involved. * * * In my opinion the nerve itself, the integrity of the nerve, is involved. * * * They are pinned down tight so that they do not perform their functions properly. * * * They are bound down with adhesions that have occurred with the injury to the sheath. * * * I am convinced beyond a question of a doubt that this girl is suffering from what is known as traumatic neurasthenia, commonly known as nervous prostration, and that such nervous prostration is the result of an organic change and that it is permanent. I think the seat of the organic change is at the point that I have described. * * *"

4. A motion for a new trial was made, which included as one of the reasons why the verdict should be set aside, that it was excessive. No request was made of the trial court to file reasons for overruling the motion, and none were given. This court has repeatedly held that it cannot in such case consider error assigned upon such refusal. *Moerman* v. *Clark-Rutka-Weaver Co.*, 145 Mich. 540.

5. Error is also assigned upon remarks of counsel for plaintiff in his argument to the jury, on the ground that they were prejudicial. An examination of the parts of the argument objected to satisfies us that they were made in the heat of the argument, and that counsel himself

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made an honest attempt to correct any wrong impression they might have made. We cannot say that the language, although not in good taste, was of such a nature as to prejudice the jury against defendant.

The other errors assigned do not require discussion.

The judgment is affirmed.

GRANT, C. J., and BLAIR, MOORE, and CARPENTER, JJ., concurred.

RUSSELL *v.* CARPENTER.

1. CANCELLATION OF INSTRUMENTS—MENTAL INCAPACITY—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

   To warrant the setting aside of a conveyance on the ground of mental incapacity and undue influence and duress, the evidence must be more substantial than sufficient to raise in the mind a suspicion that such conditions existed, a fair preponderance of the proof being necessary in such a case as in any other.

2. SAME—EVIDENTIARY FACTS—COGENCY.

   The fact that those entitled to receive the bounty of a decedent have not been equally remembered is not, of itself, sufficient evidence of mental disturbance, or of improper and vicious conduct on the part of those most favored.

3. SAME—EVIDENCE—SUFFICIENCY.

   On a bill to set aside a deed and a change in the beneficiary of a benefit certificate, on the ground of mental incompetency and undue influence, evidence examined, and *held*, insufficient to establish that the grantor was incompetent or under restraint or undue influence.

Appeal from Livingston; Miner, J. Submitted January 17, 1908. (Docket No. 85.) Decided June 27, 1908.

Bill by Cora L. Russell and Eva J. Gibson against

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Bert Carpenter, the Knights of the Modern Maccabees, and others, to set aside a deed and a change in the terms of a benefit certificate. From the decree rendered, complainants and defendants Carpenter appeal. Reversed, and bill dismissed.

Louis E. Howlett and *George Pardee*, for complainants.

William P. Van Winkle and *E. C. Shields*, for defendants.

MCALVAY, J. The bill in this cause was filed by complainants against defendant Bert Carpenter, his wife, and the Knights of the Modern Maccabees, for the purpose of setting aside a certain deed made by the father, Samuel Carpenter, to the principal defendant, and for setting aside a certain benefit certificate issued by the Maccabees naming said defendant as beneficiary in the place and stead of a former certificate taken out by the father in favor of his wife, afterwards deceased. Complainants claim that such transfers were made when their father was mentally incompetent, and because of the undue influence of the son.

The complainants and defendant Bert Carpenter are the sole heirs at law of Samuel Carpenter, deceased. He lived with his wife and family upon a farm in Livingston county for many years. He owned about 120 acres of land, but sold one 40 acres leaving 77 acres. His wife died in 1894. She had a benefit certificate in the Maccabees for $1,000 payable to the son.

After the wife's death, Samuel Carpenter and the son, Bert, lived together on the farm until the son married, the old gentleman doing the housework. The son married in December, 1902, after which time, until his death, the father, the son and his wife composed the household.

On March 10, 1906, Samuel Carpenter made a will providing a legacy of $250 for each of complainants, payable one-half in two years and one-half in three years after

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his death, without interest, making such legacies a charge against his farm until paid. The balance of his estate, real and personal, he devised to his son, Bert Carpenter, and appointed him executor.

Samuel Carpenter was first taken with his last sickness in February or March, 1906. He became well enough in June to make a visit of two weeks to his daughter Mrs. Gibson. After his return he gradually grew weaker and was confined to his room and bed for most of the time after August 1st until December 7th, when his death occurred. From the beginning of April until his death medical attendance was required practically all of the time. During this time he remained on the farm, and was cared for by his son and wife, and by both complainants, who apparently gave such time as their duties to their families permitted.

The change making the benefit insurance payable to the defendant Bert Carpenter occurred September 18, 1906, and the deed in dispute was executed and delivered October 16, 1906.

Upon the hearing of the case the court granted relief as to the benefit certificate, setting it aside on account of undue influence and insufficient mental capacity and holding the first certificate to be in force and effect, and denied relief as to the deed in question, holding that the transfer was the free, voluntary act of deceased, with mental capacity to perform the same. These two transfers practically disposed of all of the estate of Samuel Carpenter, and is all of the property in dispute in the case. Both parties have appealed from the decree of the circuit court.

The case presents the usual features of cases of this kind, where a dispute arises between heirs who have not received equal consideration in the disposition of a parent's estate.

To determine that mental incapacity exists, and that undue influence and duress have been exercised, it is necessary that evidence should be more substantial than sufficient to raise in the mind a suspicion of such conditions.

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Courts do not consider that the fact that those entitled to receive the bounty of a decedent have not been equally remembered is, of itself, sufficient evidence of mental disturbance or improper and vicious conduct on the part of those most favored. A fair preponderance of the proof must be furnished to establish such facts, the same as is necessary to establish any other fact. In this case there is much proof to show that some feeling existed between these children. It is evident that the son was not at all pleased with the terms of the will his father had made, and there is also evidence tending to show at least a willingness on his part to have the property disposed of otherwise. He was a coarse, profane fellow, and the undisputed evidence shows that the language he frequently used towards his father was disgraceful and shocking.

The question for us to decide is one of fact. To digest the evidence in this record will be of no benefit to the profession. Our conclusion from an examination of the entire record is that the complainants have not established that decedent at the time either or both of the transactions in dispute occurred was mentally incompetent or under restraint and undue influence. The positive and substantial evidence in the case satisfies us by a fair preponderance that such was not the case, and that Samuel Carpenter, at the time he procured the change in the benefit certificate, and when he executed the deed reserving a life interest, was competent to perform these acts, and that he acted of his own free will.

The decree of the court setting aside the benefit certificate is reversed, and a decree will be entered in favor of defendants. The bill of complaint will be dismissed and the injunction dissolved. Defendants will recover costs of both courts.

GRANT, C. J., and BLAIR, MOORE, and CARPENTER, JJ., concurred.

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LYNCH *v.* SAGINAW VALLEY TRACTION CO.

1. MASTER AND SERVANT—PERSONAL INJURIES—RISKS ASSUMED—CONDUCT OF BUSINESS.

   A master may conduct his business in his own way, and, unless a servant wishes to assume the risks of such method as his master has adopted, he should refuse to enter upon the employment, or leave it upon discovering the method, and a servant, knowing the hazards of the employment as the business is conducted, cannot recover for injuries received, on the ground that there was a safer way of conducting the business, which, had it been adopted would have prevented the accident.

2. SAME—METHOD OF INSPECTION.

   An experienced lineman, in the employ of an electric railway company, who knew that it was the practice of the company to make no separate inspection of poles, but to rely upon such as the linemen should make when occasion required them to work upon them, and that all changes of and repairs upon poles were made by the crew, in which he participated, assumed the risk of injury resulting from the employer's method of inspection.

3. SAME—CUSTOM—EVIDENCE—ADMISSIBILITY.

   In an action by an electric lineman against his employer, an electric railway company, for personal injuries, based upon alleged negligence on the part of the company in failing to provide proper inspection of its poles, evidence that it was the universal custom of such railway companies to omit other inspection than that made by their repair crews, such as the crew with which plaintiff was working, was admissible on the question of assumption of risk.

Error to Saginaw; Gage (Chauncey H.), J. Submitted January 24, 1908. (Docket No. 156.) Decided June 27, 1908.

Case by Edward Lynch against the Saginaw Valley Traction Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed, and no new trial ordered.

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Weadock & Duffy, for appellant.

Crane & Crane, for appellee.

HOOKER, J. The plaintiff was injured by reason of the fall of a pole while at work thereon for the defendant. He recovered a judgment of $500 for injuries sustained, and the defendant has appealed. The pole was one of 3,500 or more set about 15 years before the accident, to carry the span wires supporting the trolley wire of an electric railway. They were set at the time the road was constructed by the defendant's vendor. The negligence complained of is a failure to inspect.

The accident occurred under the following circumstances: The foreman of the line crew directed the plaintiff and others of the crew to go to a certain street and raise the trolley wire to a height of 19 feet above the street. To do this the "high wagon," as it is called, was driven under the span wires in succession, a man upon the wagon supporting the trolley wire upon his shoulder while the plaintiff climbed poles on each side, substituting for the old span wire a new one which he fastened to the poles at a proper and higher point than the old span wire had occupied. Then the trolley wire was let down upon the new span wire and fastened, care being taken to avoid a sudden contact which would make an unnecessary and dangerous strain on the poles, the weight of the trolley wire at the point of contact being about 100 pounds, under the normal contact. The plaintiff had climbed several poles, and the change had been successfully made at such points. When the trolley wire was let down upon the next one, the weight was too much for the pole, and it broke below the ground and fell with plaintiff. Examination showed that it was badly rotted below ground, within an outer shell of sound wood. Above ground its exterior showed no signs of decay.

The defendant had owned the road about five years, and the evidence shows that it had never provided for any periodical and systematic, or, in fact, any general in-

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spection of the poles to ascertain their condition, but had depended upon the linemen to repair or replace them when they should be discovered by them or reported by other employés to be broken. It is conclusively shown that the plaintiff and other linemen knew that such was the practice and that there was no other method of inspection.

Counsel offered to show that this was the universal practice on electric roads, but the testimony was excluded, and in his charge the judge instructed the jury as follows:

"I charge you that it was the duty of this company, so long a period of time having elapsed since the origin of the interurban system and the setting of these poles—that it was their duty to provide for their inspection in reference to the decay, and that the inspection should be by a class of men or man, so far experienced that they could report to them the condition of the wood itself, as to whether it was safe or not. If they omitted to do this, and it appears that they did nothing in that regard—that is the proof in the case—they failed to discharge a duty that they owed to this lineman in that connection when they gave the order to go to that point as a place to work."

This was to all intents and purposes equivalent to advising the jury that the defendant was negligent in not providing for the inspection of its poles by some one other than the line or high wagon crew.

A master may conduct his business in his own way. Unless a servant wishes to assume the risks of such method as his master has adopted, he should refuse to enter upon the employment, or should leave it on discovering the master's method of doing business. *Hawk* v. *Railway Co.* (Pa.), 11 Atl. 459.

A servant, knowing the hazards of his employment as the business is conducted by the master, cannot recover for injuries received, on the ground that there was a safer way for conducting the business, which, had it been adopted, would have prevented the accident. *Naylor* v. *Railway Co.*, 53 Wis. 664; *Schultz* v. *Railway Co.*, 31 N. W. 321 (67 Wis. 616). In a note to this case many

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cases sustaining the rule will be found. See, also, *Hewitt* v. *Railroad Co.*, 67 Mich. 61; *Illick* v. *Railroad Co.*, 67 Mich. 632; *Cantwell* v. *Brennan & Co.*, 125 Mich. 349.

The undisputed proof shows that the plaintiff was an experienced lineman, that he knew that it was the practice of the company to make no separate inspection of poles, but to rely on such as the lineman should make when occasion required him to work upon them; that all changes of, and repairs upon, poles were made by the crew, in which he participated. He continued, if he did not accept, his employment, with full knowledge of these things, and he therefore assumed the risks attendant thereon. *Kohn* v. *McNulta*, 147 U. S. 238; *Tuttle* v. *Railway*, 122 U. S. 189; *Hickey* v. *Taaffee*, 105 N. Y. 26; *Gibson* v. *Railway Co.*, 63 N. Y. 449; *Chesapeake, etc., R. Co.* v. *Hennessey*, 38 C. C. A. 607; *Narramore* v. *Railway Co.*, 37 C. C. A. 499 (48 L. R. A. 68); *Birmingham Railway & Electric Co.* v. *Allen*, 99 Ala. 359 (20 L. R. A. 457); *Louisville, etc., R. Co.* v. *Frawley*, 110 Ind. 18; *Michigan Cent. R. Co.* v. *Austin*, 40 Mich. 247; *McGinnis* v. *Bridge Co.*, 49 Mich. 466; *Richards* v. *Rough*, 53 Mich. 212; *Jacobs* v. *Railway Co.*, 84 Mich. 299; *Journeaux* v. *E. H. Stafford Co.*, 122 Mich. 400. See, also, note to case, *Georgia Pacific R. Co.* v. *Dooley*, 12 L. R. A. 342 (86 Ga. 294).

Similar cases to the one now before us have often arisen. In *Cumberland Telephone Co.* v. *Loomis*, 87 Tenn. 504, it was held:

"A charge to the effect that a servant may assume that a telephone pole, which he is required to climb in due course of his employment, is safe and suitable for that purpose, is erroneous in a suit brought by the servant for injuries caused by the breaking of the pole, in that it relieves him from the exercise of ordinary care for his own safety, and decides that he was not the company's 'inspector' of poles—a disputed fact."

McGorty v. *Telephone Co.*, 69 Conn. 635, was a case much like this. The court said:

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"We have no occasion, upon the facts found, to consider whether the foreman Phelps was a fellow-servant of the plaintiff, a question discussed in the briefs of counsel. The accident did not occur from the negligence of Phelps. It is true he directed the plaintiff to climb the pole, and in answer to the latter's inquiry truthfully said, as might any other lineman who had tested the pole for himself, that he had been up the pole, and expressed his opinion that it was safe. But the plaintiff knew that it was not a part of the duty of the foreman to instruct an experienced lineman as to the safety of a pole he was about to climb; and from the facts found we must assume that although he knew that in obedience to the order of the foreman he was required to do the work upon the pole, yet he was to rely upon his own judgment in determining whether it was safe to climb it without testing it or supporting it, and that it was his right to secure the pole before climbing it if he doubted its safety.

"It cannot be laid down as a proposition of law, as seems to be claimed by plaintiff's counsel, that the linemen of telegraph and telephone companies have a right to rely upon the soundness and safety of the poles upon which they are working, and that it is the duty of such companies to inspect and test poles and support such as are insecure, before permitting their linemen to climb them. Whether it is incumbent upon the master or the servant to perform such a duty is usually a question of fact depending upon the terms of the contract of employment, the servant's knowledge of the hazards of the work in which he is engaged, his ability and opportunity to discover the dangers to which he is exposed and to avoid them, and upon other circumstances. Employers have a right to decide how their work shall be performed, and may employ men to work with dangerous implements, and in unsafe places, without incurring liability for injuries sustained by workmen who knew or ought to have known the hazards of the service which they have chosen to enter. *Hayden* v. *Manufacturing Co.*, 29 Conn. 548; *Dixon* v. *Telegraph Co.*, 68 Fed. 630; *Greene* v. *Telegraph Co.*, 72 Fed. 250; *Flood* v. *Telegraph Co.*, 131 N. Y. 603; *Cumberland Telephone Co.* v. *Loomis*, 87 Tenn. 504."

See, also, *Tanner* v. *Railroad Co.*, 180 Mass. 572, and *Sias* v. *Lighting Co.*, 73 Vt. 35.

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In *McIsaac* v. *Lighting Co.*, 172 Mass. 89, it is said:

"The plaintiff contends that the defendant was guilty of negligence in failing to ascertain whether the pole was sound and strong, or to take other precautions for his safety.

"The plaintiff was directed to go and take down from the pole the two wires upon it which belonged to the defendant, and to put them on a new pole near by, which had been erected on account of a change of grade in a railroad at a crossing. He went alone to do the work, using a horse and wagon belonging to the defendant to carry such tools and materials as he thought he needed. He was a man of experience in this kind of business, and the method of doing the work he seems to have determined for himself. The pole was of chestnut wood, about 8 inches in diameter at the top, and about 14 inches at the surface of the ground. It had been set between eight and nine years, and the evidence tended to prove that it showed no weakness or sign of decay above the ground.

"A fundamental question is whether the defendant owed to a lineman, whose business it was to work upon poles all along the line, as occasion might require, the duty to inspect its poles below the ground, and inform the linemen whenever any of them were so decayed as to be unsafe to work upon. The plaintiff admitted in his testimony that he knew that the life of a pole was limited, and that any pole after a time would become unsafe. He had worked upon poles in the construction and repair of electric lines many years. When he engaged to work for the defendant he knew it would be his duty to go upon poles that had been set in the ground an uncertain length of time. He must have known that the work of climbing poles and taking down and putting up wires would often put a strain upon a pole much greater than it would be exposed to in sustaining wires when they were all in their proper positions. He must have known that it would be inexpedient and impracticable to have a man or company of men to go and examine each pole upon which a lineman was about to work, to see whether it would sustain the strain which the work would put upon it. The evidence was undisputed that it was easy to determine very quickly whether a pole was badly decayed a little below the surface of the ground, and that no skill or experience was required to do it beyond that which was possessed by ordinary linemen. The plaintiff testified that there were

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risks about the business with which he was familiar as a lineman. We think that one of the most common and obvious of these, in reference to which both he and his employer must have been presumed to have contracted when he entered the defendant's service, was the risk that some pole of uncertain age might break and fall when a lineman was working upon it, if he did not take measures to ascertain its condition, before going upon it. All the evidence tends to show that, in the ordinary course of the business, the linemen, who are often expected to work alone without supervision, as the plaintiff was working at the time of the accident, would examine the poles for themselves, so far as they considered it necessary to do so for their safety. They easily could make any necessary tests to ascertain the condition of the poles as to soundness, without the aid of special inspectors, and from their knowledge of common affairs could judge whether the pole was safe to go upon. The plaintiff testified that there were pike poles belonging to the defendant at the shed from which he started with the horse and wagon, and that he was familiar with the use of pike poles in setting new poles and bracing up old ones, and there is nothing to show that he might not have taken some of them to use in the work if he had chosen to.

"The burden was upon him to show that the defendant's neglect of some duty caused the accident. We are of opinion that there is no evidence that the risk of falling on account of the weakness of old poles was not a risk of the business, which the plaintiff assumed by his contract to work upon such poles. As between the plaintiff and the defendant, the defendant was under no obligation to inspect the poles to see whether they were decayed, and there was, therefore, no evidence of negligence on the part of the defendant."

In *Britton* v. *Telephone Co.*, 131 Fed. 844, Lurton, J., said:

"We see no reason why a lineman, in view of the peculiar character of his work, may not lawfully contract to do any inspecting or testing reasonably necessary to determine whether he can safely climb a particular pole for the purpose of adjusting, transposing, or placing new wires. His acceptance of service with knowledge of the way in which the company conducts this part of its business, whether that way be the safest way for him or not,

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would imply an assumption of the risks incident to that mode of carrying on its work. Linemen must, in the very nature of the occupation, be often required to work alone, or in association with another lineman, and it would seem quite impracticable and unreasonable to send one man as an inspector with another of equal fitness to test a pole before climbed by the latter. The case might be altogether different if skill of a kind not presumably required from a lineman in the usual course of his calling was necessary to apply the tests reasonably sufficient in such cases. The tests which the plaintiff's evidence shows to be customarily used are by shaking, by pushing against the pole by means of a long staff with a point at one end, and by throwing away the dirt next the surface at the base of the pole and examining by use of an axe or crowbar the soundness of the pole at that point. These tests are all simple, and quite within the range of the experience of a qualified lineman, as shown by the evidence in this case. The experience of any such lineman would advise him that the life of a pole varies with climate, soil, and character of the wood. The same experience would warn him of the danger of putting the strain incident to climbing and removing or adjusting wire upon a pole of uncertain age, for a pole may well stand under the support of wires extending from one pole to another which will not stand under the weight of a man with the tension of the wires removed. That he should be held to assume the risks incident to climbing after making such examination and tests as his own experience and judgment should indicate were necessary, is not inconsistent with the fair implications arising from his acceptance of employment. * * *

"The principle applicable in such cases is that, by continuing in the service with knowledge of the manner in which that business is conducted, the servant agrees that the dangers obviously incident to the discharge of his duties, when he is expected to determine for himself the safety of a particular pole before climbing, shall constitute a term of the contract of employment. This is the doctrine of assumption of risk as many times expounded by this and other courts."

The court erred in excluding testimony offered to show that it was the universal custom of such railroad companies to omit other inspection than that made by the repair

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crew, and it was also error to instruct the jury that such omissions constituted negligence. Under the undisputed proof and the broad admissions of the plaintiff himself, the court should have directed a verdict for the defendant.

The judgment is reversed, and no new trial will be ordered. The defendant will recover costs of both courts.

GRANT, C. J., and OSTRANDER and CARPENTER, JJ., concurred. MONTGOMERY, J., concurred in the result.

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HADEN *v.* CLOSSER.

1. APPEAL AND ERROR — BRIEFS — STATEMENT OF FACTS — SUFFICIENCY.

   Where the appellee points out no errors in appellant's statement of facts, but makes an entirely distinct statement, raising questions not involved in appellant's statement, in disregard of Supreme Court Rule 40, the court will adopt the statement made by appellant, and consider only the question raised thereby.

2. TAXATION—TAX SALES—NOTICE TO REDEEM—SUFFICIENCY.

   Where a description of land is sold for the taxes of several years, the notice given by the tax-title purchaser, under section 140 of the tax law, must show the amount paid for that description, separate from all others, for the entire time covered by the notice.

Case made from Chippewa; Steere, J. Submitted February 19, 1908. (Docket No. 75.) Decided June 27, 1908.

Ejectment by John F. Haden against Dayton W. Closser and others. There was judgment for defendants on a verdict directed by the court, and plaintiff appeals. Affirmed.

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R. A. & W. E. Hawley (*Oren, Webster & Carleton*, of counsel), for appellant.

Dayton W. Closser (*Davidson & Hudson*, of counsel), for appellees.

This is an action of ejectment to recover the standing timber on the W ½, N E ¼, section 23, town 44 N, range 4 W, in Chippewa county. It is brought here on a case made.

Plaintiff claims title through a tax deed from the State. Defendants are the owners of the original title. Under the statement of facts made in appellant's brief, the title depends upon the validity of the notice served upon the original owners under section 140 of the tax law. The defendants point out no errors in the statement of facts, but have made an entirely distinct statement in utter disregard of Supreme Court Rule 40. Defendants' statement of facts raises other questions than the one involved in plaintiff's statement. We will therefore adopt the statement as made in the appellant's brief and consider only the question raised thereby, namely: The validity of the notice above mentioned.

The notice contained many other descriptions, but, as applied to the one here in issue, the notice is as follows:

"Description.	Sec.	Town	Range	$	¢	Year 1—
"Northwest ¼ of Northeast ¼	23	44 N	4 W	13	17	1897, 1898, 1890, 1895, and 1896.
Northwest ¼ of Northeast ¼	23	44 N	4 W	10	13	1891, 1892, 1893, and 1894.
West ½ of Northeast ¼	23	44 N	4 W	1	68	1900.
West ½ of Northeast ¼	23	44 N	4 W	2	54	1899.
W ½ of N E ¼; S E ¼ of N E ¼	23	44 N	4 W	5	70	1901.
And S E ¼ and S ½ of N W ¼ and S W ¼	24			5	36	1902."

The court directed a verdict for the defendant for the

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reason that in stating the amount of taxes upon the W ½ of NE ¼ for the years 1901 and 1902, the said description was bunched with the other descriptions and the taxes given in a gross sum, and the notice did not indicate the amount paid for taxes on said description, and therefore the original owner could not determine how much of the taxes for 1901 and 1902 had been paid on said W ½ of NE ¼, and were thereby uninformed of the total amount that was paid by the purchaser as a condition of the purchase of said W ½ of NE ¼, or how much was required to obtain a reconveyance of the land.

GRANT, C. J. (*after stating the facts*). It is conceded that the first four paragraphs are valid, and that the fifth paragraph is invalid for the reason stated by the learned circuit judge. The question is, as stated by appellant's counsel, Does the one invalid paragraph affect the others, admittedly valid, and render the entire notice, so far as it relates to the land in question, of no legal force or effect? The precise question has never before been presented to the court. Counsel for the defendants insist that the case is controlled by *Jackson* v. *Mason*, 143 Mich. 355; *John Duncan Land & Mining Co.* v. *Rusch*, 145 Mich. 1; *G. F. Sanborn Co.* v. *Johnson*, 148 Mich. 405. They do not necessarily control it. In those cases the deeds contained several descriptions of land and the notice gave only the sum required to redeem them all as though there was only one description. It was held that the owner of the tax title must state in his notice the amounts for which each parcel was sold, as the original owner was entitled to a reconveyance of any one parcel. In this case four of the paragraphs contain all that the statute requires. The same land was sold for other years, and in describing that sale and deed obtained by virtue thereof the notice did not give the original owner the information required. Standing by itself, the notice would be void under section 140, and under the above decisions.

While there is some force in the contention on behalf

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of the plaintiff, that payment upon the valid four paragraphs would have entitled the defendants to a reconveyance of the land, and would have estopped the plaintiff from making any further demand under the 5th void paragraph, my brethren are all of the opinion that it was incumbent upon the plaintiff to state the amount separately in all five paragraphs, and that this case is within the principle of the above cases. I yield to their opinion. We therefore hold that where the same description of land is sold for several years the notice must show the amount of the same description for the entire time covered by the notice.

Judgment affirmed.

BLAIR, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

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AINSWORTH v. MUNOSKONG HUNTING & FISHING CLUB.

1. INJUNCTION—PROPRIETY OF ISSUANCE.
   The first question in an injunction case, in addition to the general question on the threshold of every chancery case relative to jurisdiction, is as to the necessity for the restraining writ of the court, and this is determined by ascertaining the nature of the injury done or threatened.

2. SAME—REMEDY AT LAW—CONTINUING TRESPASS—MULTIPLICITY OF SUITS.
   Where defendant by its agents and servants had repeatedly interfered with complainants' right to hunt wild fowl upon certain navigable waters, and threatened to continue so doing, complainants' remedy at law by a multiplicity of actions for trespass was inadequate, and the existence of such remedy was no objection to their right to an injunction.

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3. SAME — RIGHT TO HUNT ON NAVIGABLE WATERS — PROTECTION BY INJUNCTION.

The right of citizens to hunt wild fowl on the navigable waters of the State is a civil right, protection in the exercise of which is within equitable jurisdiction.

4. SAME—SUBSTANTIAL INJURY.

Such right is not merely a bare legal right, interference with which causes no substantial injury, but is a right of sufficient dignity that interference therewith may be prevented by injunction.

5. SAME—BILL—SUFFICIENCY.

A bill filed by citizens of the State against a hunting club to enjoin interference by defendant with complainants' right to hunt wild fowl upon the navigable waters of an arm of the Great Lakes, which alleges that defendant, by its agents and game keepers, claimed the exclusive right to hunt in such waters, and unlawfully interfered with complainants' exercise of such right by rowing boats among complainants' decoys and preventing ducks from alighting near them, and advertises that it will continue to prevent all persons, including complainants, from hunting there, sufficiently states an apprehended and threatened injury to justify an injunction.

6. SAME—IRREPARABLE INJURY—WHAT CONSTITUTES.

The threatened injury to complainants was irreparable within the rule that an injury is irreparable when it cannot be adequately compensated in damages, or when there exists no certain pecuniary standard for the measurement of damages, due to the nature of the right or property injured.

7. FISH—FISHING RIGHTS—PROTECTION.

The right to fish in navigable waters is a public right, for injury to which an action for damages will lie, or, if the injury be irreparable, or is one for which the law furnishes no adequate remedy, it may be restrained by injunction.

8. GAME—RIGHT TO HUNT—PROTECTION.

The right to hunt wild fowl upon the navigable waters of the State is a public right, of which any citizen may avail himself, subject to the game laws of the State, the exercise of which will be protected by the courts.

Appeal from Chippewa; Steere, J. Submitted February 25, 1908. (Docket No. 153.) Decided June 27, 1908.

Bill by Corydon E. Ainsworth and Frank Trempe

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against the Munoskong Hunting & Fishing Club to enjoin the interference with hunting wild fowl on navigable waters. From an order sustaining a demurrer to the bill, complainants appeal. Reversed, and remanded.

E. S. B. Sutton, for complainants.

Sharpe & Handy, for defendant.

MCALVAY, J. Complainants, residents of the county of Chippewa, filed their bill of complaint against defendant, praying that defendant be enjoined from interfering with, preventing and molesting complainants in the pursuit of their common right to hunt wild fowl on Munoskong Bay in said county, whose waters as is claimed in said bill are a part of the Great Lakes, the defendant claiming to have exclusive right to take such wild fowl.

The material matters set forth in the bill of complaint necessary to state are: That the waters referred to are navigable meandered waters; that they were hunting ducks on said waters in a row boat about one-half mile from shore, and had set their decoys for that purpose; that the agents and servants of defendant corporation came from the club house and ordered complainants to cease hunting ducks claiming the exclusive right to hunt ducks on said waters to be in defendant, and that complainants had no right or privilege to do so; and that the agents and servants of defendant wilfully and with intent to prevent complainants from hunting ducks upon these waters rowed their boat about among the decoys and prevented ducks from alighting near them, and prevented complainants from shooting and securing them; that complainants moved their decoys from that place to another upon the navigable waters of this bay, where they might lawfully hunt ducks, and that these parties followed them repeating their unlawful conduct, and, acting under orders of defendant, again prevented complainants from hunting; that they followed complainants about with their boat and finally they were unlaw-

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fully compelled to cease from exercising their lawful right to hunt on this navigable meandered bay; that defendant's servants when requested to keep away and desist from interfering with them refused, and said they were game keepers of defendant which had employed and placed them there to prevent any persons except members of the club from hunting on said waters, which right was possessed solely and exclusively by defendant; which conduct complainants allege is in violation of their inalienable rights in the pursuit of happiness and also of their personal liberty. Complainants allege that defendant club owns certain land on the border of this bay upon which land is a club house where these game keepers remain for the purpose of keeping hunters from these waters and that defendant claims that by reason of such ownership it has the exclusive right to hunt on said waters; that defendant through its members has publicly stated and advertised the fact that they will prohibit and prevent all persons, including complainants, at all times from hunting upon these waters.

The bill avers that this bay is navigable by large steam and sail craft; that the ownership of defendant extends only to high or low water mark, at which point the fee of the State of Michigan begins, and that they have a right, at all times when the law so allows, to hunt upon said waters in common with all citizens of the State; that the lands covered by the waters of said bay beyond the meandered line thereof are unsurveyed and none of them are owned or possessed by defendant but belong in fee to the State of Michigan, held by the State as trustee for all of the people of the State, and complainants have as much right to hunt upon these waters as the members of defendant club. The bill also states that complainants desire and intend to hunt on said bay during the then approaching open season of 1907, but will be prevented from doing so by defendant's servants and agents unless they are enjoined from interfering with them to the irreparable loss and injury of each of them; all of which is alleged to be

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contrary to equity and the rights of complainants and to their manifest wrong and injury. The bill alleges jurisdiction and contains all the usual and necessary formal parts of a bill in chancery and prays that defendant and its members, agents, etc., be restrained and enjoined from interfering with, obstructing, and preventing, in any manner, complainant from the free exercise of their right to hunt wild fowl upon said waters. A preliminary injunction issued upon filing the usual bond in the sum of $500. A motion for dissolution of this injunction was denied.

Defendant then demurred to the bill of complaint upon the following grounds:

1. Complainants have not, in and by their said bill, made or stated such a cause as entitles them in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said bill or in any of such matters.
2. It appears by the said bill of complaint that if complainants have any cause of action relative to the matters set forth in said bill of complaint, they have an adequate remedy at law.
3. It appears by said bill of complaint that the rights affected of complainants, if any, are to their persons and not to their property.
4. That said bill of complaint fails to show any immediate danger of irreparable damage.
5. That complainants have been guilty of such laches that they are now barred and estopped from asking relief.
6. That complainants seek to restrain others from doing acts and things they have a legal right to do.
7. That the allegations in said bill of complaint are insufficient to give the court jurisdiction to grant the relief prayed for.

Upon a hearing a decree was granted sustaining the demurrer and dismissing the bill of complaint. Complainants have appealed. The demurrer admits the truth of the facts charged in the bill of complaint.

At this time, then, there is no necessity for discussing complainants' rights in the premises, and we assume that the waters upon which they were attempting to pursue,

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hunt, and capture wild fowl were navigable waters, where they were entitled to exercise all the rights they claim. We may also assume that the hired servants of defendant wrongfully and unlawfully, under the instructions of their employer, the defendant, by the means stated, interfered with complainants in the peaceable enjoyment of their rights, under the claim that defendant had acquired exclusive rights and privileges for its members to hunt wild fowl upon these waters; and that such interference will continue to the damage and injury of complainants.

The only proposition to consider is whether the bill sets forth such a cause of action over which a court of equity will entertain jurisdiction, and whether the bill of complaint states facts and circumstances sufficient to entitle complainants to an injunction against defendant.

It will be unnecessary to cite and discuss text writers and authorities as to the fundamental principles which govern courts in issuing or denying relief by injunction. The first question in an injunction case, in addition to the general question on the threshold of every chancery case relative to jurisdiction, is as to the necessity for the restraining writ of the court. This is determined by ascertaining the nature of the injury done or threatened. This is strictly an injunction bill and to deny an injunction, preliminary or permanent, disposes of the whole case.

If hunting for wild fowl upon these navigable waters for recreation or health is a right which the complainants are entitled to exercise, no person may lawfully interfere with the reasonable and lawful exercise of that right. If it is urged that trespass will lie against defendant and its officers and agents for the wrong complained of, the repetition and continuance of the interference with complainants would require a multiplicity of suits, and if complainants must be relegated to such suits they certainly would be absolutely deprived of the exercise of a legal and substantial right, and the damages possible to be obtained would be wholly inadequate. Parties in such cases should

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be entitled to equitable relief. *Nashville, etc., R. Co.* v. *McConnell*, 82 Fed. 65.

The right upon which complainants insist is a civil right and their protection in its exercise clearly within equitable jurisdiction. 22 Cyc. p. 757.

We think that this right is not merely a bare legal right interference with which causes no substantial injury. To many people such rights are highly prized and their exercise valuable and necessary. To hold that such rights are not of sufficient dignity that interference therewith, and the prevention of their lawful exercise, and threatened continuance of such interference, will be taken cognizance of by the courts, and injury arising therefrom prevented, would be to deprive complainants of such rights, and to encourage wrongdoers in the assumption of the sovereign prerogative. The allegations of the bill of complaint as to the apprehended injury threatened by defendant are sufficient. The averments of the bill, not being denied, are sufficient if charged on information and belief. 1 High on Injunctions (4th Ed.), § 35.

From the state of the pleadings, there is no dispute here as to complainants' rights; whether there is an injury for which a suit at law will furnish no adequate remedy, and whether that injury is irreparable are the crucial questions. The first we have decided in the affirmative. Whether an injury to property or rights is irreparable depends in each case upon the nature of the right or property.

"An injury to be irreparable need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages, or when there exists no certain pecuniary standard for the measurement of damages * * * due to the nature of the right or property injured." 22 Cyc. pp. 763, 764, and cases cited.

The right to fish in navigable waters is a public right. 13 Am. & Eng. Enc. Law (2d Ed.), p. 560, and cases cited.

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An action for damages will lie for injury to such right. 13 Am. & Eng. Enc. Law (2d Ed.), p. 584.

The authorities hold that certain injuries to fishing which if permitted would be irreparable or for which the law furnishes no adequate remedy, may be restrained by injunction. 13 Am. & Eng. Enc. Law (2d Ed.), p. 585, and notes.

To hunt and fish in and upon the navigable waters such as these is a public right of which any citizen may avail himself subject to the game laws of the State. The right to hunt is as valuable to the individual as his right to fish, and the authorities which sustain and protect him in the exercise of the one may be invoked with equal force as to the other. We are unable to draw any distinction between them.

Our conclusion is that the injury to complainants' rights complained of comes within this definition. The decree of the circuit court sustaining the demurrer and dismissing the bill is reversed, with costs of both courts to complainants. The cause will be remanded and defendant allowed the time fixed by rule to answer said bill of complaint.

GRANT, C. J., and HOOKER, MOORE, and CARPENTER, JJ., concurred.

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McFARLANE v. SIMPSON.

1. TAXATION—TAX SALE—RESALE—OFFER—EVIDENCE.
On a petition for a writ of assistance by a purchaser from the State under a tax sale, testimony respecting a verbal offer by petitioner to sell the lands to respondent for what they had cost him examined, and *held*, that the offer was not to be left open indefinitely, and that the most that could be said was that respondent might have understood the offer to be open for a reasonable time.

2. SAME—REDEMPTION—NOTICE—APPLICATION OF STATUTE.
Act No. 229, Pub. Acts 1897, providing for a notice of tax purchase to be served on the owner of the lands sold, has no application to sales made by the auditor general prior to the date of the act taking effect.

3. SAME—NOTICE—EFFECT.
Where one who purchased under a tax sale, before Act No. 229, Pub. Acts 1897, took effect, served upon the owner of the land the notice required by that act, such notice could not be regarded as a continuing offer to sell, but the most favorable view that can be taken for the owner is that it would not have lain with the purchaser to refuse to accept redemption on the terms stated in the notice, had a tender been made within the time stated; whence a deposit with the county clerk, after the period of redemption stated in the notice had expired, was ineffectual.

4. SAME—OPENING DECREE—LACHES.
Where a landowner knew for nearly seven years that petitioner had bought his land from the State and held a tax deed therefor and claimed title to it, but made no effort to open the decree until the purchaser petitioned for a writ of assistance, though petitioner for two years had been insisting upon payment in full, there is such laches as will preclude an attack upon the decree upon the ground that the auditor general included in his petition lands which had been previously sold and bid in to the State.

Appeal from Ontonagon; Cooper, J. Submitted April 8, 1908. (Docket No. 4.) Decided June 27, 1908.

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Petition by William McFarlane against Alexander T. Simpson for a writ of assistance as purchaser under a tax sale. Respondent filed an answer in the nature of a cross-bill making James B. Bradley, auditor general, a party defendant, and asked to have said sale set aside. From a decree for respondent, petitioner appeals. Reversed, and writ issued.

Ball & Ball, for petitioner.

M. J. Sherwood, for respondent Simpson.

MONTGOMERY, J. The petitioner presented his petition for a writ of assistance as purchaser from the State under a tax sale for the taxes of 1893. The respondent filed an answer to the petition, which he asked to have treated as a cross-bill, and included in the answer a prayer for relief and made the auditor general a party. Some question has been made as to the propriety of the practice, and there is pending a motion to strike from the files a certificate obtained by the defendant from the circuit judge, which motion is to be determined with the case. Inasmuch as the certificate of the circuit judge, as now construed by the respondent's counsel, is intended to affirm the facts only as they are conceded by the affidavit made by the petitioner, and inasmuch as we would, in any event, before dismissing this proceeding finally, permit an amended return to show the facts as they are stated in the affidavits, we do not find it necessary to grant the motion, but deal with the case on the merits.

The purchase was made by the petitioner from the State of the lands involved on July 13, 1897, the deed being dated October 1, 1897, based on a certificate of purchase given at the date first named. This certificate and deed covered the taxes of 1892 and 1893. The petitioner also paid the taxes of 1894, 1895, and 1896, and later on paid the taxes of 1898. In the spring of 1898, petitioner went to the land on which the respondent was living and asked the respondent to deliver up possession of the land. This

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the respondent refused to do. The petitioner at that time made a verbal offer to sell the lands to respondent for what they had cost him. This offer was not then accepted. It is a matter of controversy as to whether the testimony fairly shows a purpose to reject this offer, or whether the respondent had reason to believe that the offer was to be left open indefinitely. We think the most that can be said is that he might have understood the offer to be open for a reasonable time. Nothing occurred between the respondent and the petitioner until April 27, 1903, when the petitioner caused a notice of a tax purchase in the form provided by Act No. 229, Pub. Acts 1897, to be served on respondent. This notice claimed a total amount of $76.82 due for the years 1892 to 1898 exclusive. When this notice was served upon the respondent, he testified that he told the party who served it that he would pay the petitioner all the taxes and expenses less the tax of 1898, for which he held the county treasurer's receipt, and on the 24th of June following, he wrote petitioner:

"I would have sent you check for the same long ago if it had been correct, but you have made a mistake, as I hold county treasurer's receipt for the taxes for the year 1898, and don't intend to pay them twice. However, I will settle with you for the balance after that amount is deducted out, if you will call in when you are passing by."

There seems to have been no answer to this letter, and respondent then wrote to one Charles O'Rourke, who resides at Ontonagon, the place of residence of the petitioner, and sent him a check and asked him if there was more to pay to make up the balance and settle with the petitioner. This, however, was not done, and no tender was made in fact until the 5th of March, 1905, when the amount covered by the notice was paid into the hands of the county clerk. The testimony of respondent is that when he left the money with O'Rourke he was to make up the difference, whatever was required, in the opinion of Adams, a lawyer of the town, and pay it to petitioner. He also

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testified that between the time of the demand in 1903 and the time the money was deposited, Mr. McFarlane never made any demand upon him for the taxes or to give up possession of the land, and that he did not know during that time whether O'Rourke or Adams had redeemed his property from McFarlane or not.

It cannot of course be claimed that there was a tender of the tax within the time fixed by Act No. 229 of the Public Acts of 1897, even if that act should be considered as having application to this case. But, as was held in *Eldridge* v. *Richmond*, 120 Mich. 586, the act does not apply to sales made by the auditor general prior to the date of the act taking effect. It is suggested that this was an offer of sale. We think the most favorable view that could be taken for the respondent is that it would not lie with the petitioner to refuse to accept redemption on the terms stated in the notice had a tender of redemption been made within that time. But this was not done. So that if the respondent is to prevail, it must be upon the ground of irregularity or want of jurisdiction in the original proceedings in the case in which the decree was made.

It is alleged that such irregularity exists, in that the auditor general included in his petition for the sale of taxes for 1893 lands which had been previously sold and bid in to the State. The question at once presents itself as to whether this defense is open at this date, or whether the respondent is guilty of such laches as precludes the court from opening up this sale. The only excuse for the delay in instituting these proceedings that we can find is that which arises out of the effort made through O'Rourke and Adams to adjust this matter. But before the notice of 1903 was served at all, there had been knowledge on the part of the respondent for nearly five years that the petitioner had purchased these lands and claimed title thereto. It is true that there was a proposition to deal liberally with the respondent, but this proposition was not accepted or acted upon by the respondent. Nor during

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the period in which he was negotiating with O'Rourke and Adams was there any suggestion of any purpose on the part of the petitioner to compromise his claim or abate it from the amount stated in the notice of April, 1903. Respondent was therefore in no way misled by the attitude of the petitioner in the premises. Nor was he delayed by the negotiations through O'Rourke and Adams in accomplishing any purpose which he had of presenting a petition to open up this decree. So far as the record shows, he had no such purpose. We have then a case in which from 1898 to 1905, a period of nearly seven years, the respondent knew that the petitioner had become the purchaser of this land and held a tax deed therefor and claimed title to it. During a portion of this time, petitioner was willing to adjust on very reasonable terms. During nearly two years of the time he was insisting upon payment in full, and yet no action was taken to open up this decree in all this period. We feel constrained to hold that, under the prior decisions of this court, the respondent was guilty of such laches as precludes his now raising the question. See *Bending* v. *Auditor General*, 137 Mich. 500; *Owens* v. *Auditor General*, 147 Mich. 683.

The decree, which denied petitioner relief and set aside the decree on terms, must be reversed and an order entered that a writ of assistance issue.

The petitioner will recover costs of this appeal.

BLAIR, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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PRUSSIAN NATIONAL INSURANCE CO. *v.* EISENHARDT.

1. PLEADING — DECLARATION — CORPORATE PLAINTIFF — DESCRIPTION—SUFFICIENCY.

   A declaration describing plaintiff as the "Prussian National Insurance Company" is not obnoxious to demurrer on the ground that there is no averment that plaintiff is a corporation.

2. INSURANCE — FOREIGN CORPORATION — ACTION — PLEADING — AVERMENT OF AUTHORITY TO DO BUSINESS.

   A declaration by a foreign insurance company on a bond is not demurrable under section 10467, 3 Comp. Laws, for failure to aver a compliance with the statute (sections 5128, 5133, 2 Comp. Laws) prescribing conditions under which foreign insurance companies may be permitted to do business in this State.

3. PRINCIPAL AND SURETY — ACTION ON BOND — DECLARATION — SUFFICIENCY—JOINT CONDITION AND JOINT BREACH.

   A declaration in an action on a bond against two persons jointly which avers that defendants acknowledged themselves bound to plaintiff by their writing obligatory shown to the court, the condition of which was that one of the defendants, named, as agent for plaintiff should promptly pay over all moneys received by him as such agent, etc., and that he thereafter became indebted to plaintiff as such agent and refused to pay over the moneys, etc., sufficiently alleges a "joint condition in the bond and a joint breach of it."

4. SAME—LIABILITY OF DEFENDANTS—PRINCIPAL OR SURETY.

   The declaration showing a joint obligation, and that one of defendants was plaintiff's agent, and that the bond was given to secure faithful performance of his duties as such, it sufficiently appears that the agent was the principal and the other defendant the surety in the bond.

5. JUDGMENT—FORM—JUDGMENT ON DEMURRER — TECHNICAL OBJECTION.

   Under section 10272, subd. 12, 3 Comp. Laws, the use of the word "order" instead of "adjudged" in overruling a demurrer to a declaration is not reversible error.

Certiorari to the superior court of Grand Rapids;

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Stuart, J. Submitted April 10, 1908. (Docket No. 28.) Decided June 27, 1908.

Debt by the Prussian National Insurance Company against Jacob Eisenhardt, impleaded with Frank L. Carpenter, on a bond. There was an order overruling a demurrer to the declaration, and defendant Eisenhardt brings certiorari. Affirmed.

Allen C. Adsit (*Frank L. Carpenter*, of counsel), for appellant.

Crane & Norris, for appellee.

The plaintiff filed the following declaration in this case:

"Prussian National Insurance Company, of Stettin, Germany, plaintiff in this action, by Albert Crane, its attorney, complains of Jacob Eisenhardt and Frank L. Carpenter, defendants in this action by declaration filed and served in this cause, according to the statute in that case made and provided, of a plea that they render to the said plaintiff five hundred dollars, which they owe to and unjustly detain from it.

"For that whereas, the said Jacob Eisenhardt and Frank L. Carpenter, heretofore, to wit, on, to wit, the first day of November, A. D. 1901, at, to wit, the city of Grand Rapids, county of Kent and State of Michigan, by their certain writing obligatory, sealed with their seals and now shown to the court here, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said Prussian National Insurance Company of Stettin, Germany, in the sum of five hundred dollars above demanded, to be paid to the said Prussian National Insurance Company of Stettin, Germany, and the said Prussian National Insurance Company of Stettin, Germany, according to the form of the statute in such case made and provided, says that the said writing obligatory was and is subject to a certain condition thereunder written, whereby after reciting to the effect following, to wit: That the above named Jacob Eisenhardt has been appointed agent of the Prussian National Insurance Company of Stettin, Germany, for

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Grand Rapids, in the county of Kent and State of Michigan, and has accepted said trust and agreed to make true records and regular reports of all business done as such agent, to keep true and correct accounts of all moneys and other securities received by him as such agent and pay over the same to said company monthly, within thirty days; to comply promptly with all the instructions of said company and on demand, within thirty days, to pay all moneys due and to deliver all goods, chattels, papers, books and other property of the company in his possession or under his control, to said company or its duly authorized agent, and to well and truly perform, all and singular, the duties of agent of said company, so long as he shall continue as such by the present appointment, and it being expressly understood and agreed that in case of default in payment of money due said company, any notes or other security therefor shall be considered additional security only, and that said writing obligatory should not be discharged thereby, nor by any act or thing other than the actual payment, in cash, of all moneys at any time due with interest thereon until paid. And it being further agreed that the said Prussian National Insurance Company of Stettin, Germany, might from time to time, without notice to the surety and without his consent and without relieving him from liability thereunder, give time to said agent, Jacob Eisenhardt, for an accounting and paying and handing over moneys and security for money due said company from said agent, it is provided that if the said Jacob Eisenhardt should well and faithfully perform all the above agreements and all and singular, the duties of agent of said company, then said writing obligatory to be void; otherwise to be and remain in full force and effect, and that proof of plaintiff's incorporation was waived. Nevertheless, the said Prussian National Insurance Company of Stettin, Germany, in fact, says:

"That after the making of the said writing obligatory, to wit, on the first day of February, A. D. 1906, the said Jacob Eisenhardt was indebted unto the said Prussian National Insurance Company of Stettin, Germany, in the sum of five hundred dollars of the moneys of the said Prussian National Insurance Company of Stettin, Germany, which the said Eisenhardt theretofore collected in his, the said Eisenhardt's, capacity as agent for the said Prussian National Insurance Company of Stettin,

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Germany, for Grand Rapids, Kent county, Michigan, aforesaid, and being so indebted, did neglect and refuse for the space of, to wit, thirty days and upwards after demand to pay to the said Prussian National Insurance Company of Stettin, Germany, the said sum of money according to the tenor and effect of the said writing obligatory."

The declaration contained other formal and appropriate averments. To this declaration the defendant Carpenter pleaded the general issue with notice and also filed an affidavit denying the execution of the bond. Defendant Eisenhardt demurred to the declaration on the following grounds:

"1. That though this suit is brought in the name of an association, and no natural person is named as a responsible plaintiff, there is no averment in said declaration that plaintiff is a corporation.

"2. That it appears from said declaration, that the home, domicile and residence of said plaintiff is in Germany, and that it has attempted and seeks, herein and hereby, to do an insurance business in the State of Michigan; but said declaration contains no averment that said plaintiff has or ever had a license from the commissioner of insurance for said State to carry on such business, or that said plaintiff has or ever had any legal power or authority to carry on such business in said State.

"3. This defendant and said Carpenter are sued jointly herein, and said Carpenter is not averred to be a surety for this defendant, nor an agent or receiver for said plaintiff, nor shown by said declaration to be in default as to any obligation to plaintiff, by condition of said writing obligatory, or at all, either separately or jointly with this defendant.

"4. That though said defendants are sued jointly, it is not averred that said Carpenter is indebted to plaintiff by default in paying over its money, or that by the condition of the writing obligatory he bound himself to answer for the acts or defaults of this defendant in the premises."

This demurrer was overruled by the trial court and defendant Eisenhardt given permission to plead issuably to the declaration. The order overruling the demurrer is before us for review under a writ of certiorari taken out by appellant.

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CARPENTER, J. (*after stating the facts*). 1. The first question for our consideration arises from the contention of appellant that the declaration is defective because it contains no averment that plaintiff is a corporation. It is to be observed that the plaintiff is described as the "Prussian National Insurance Company of Stettin, Germany."

In *Bennington Iron Co.* v. *Rutherford*, 18 N. J. Law, 105, the plaintiffs, by the name of the Bennington Iron Company, declared against the defendant. The defendant demurred upon the ground "that it does not appear on the bill that the plaintiffs are a corporation, or have any right to maintain this suit against the defendant." The court, through Nevius, J., said:

"In the present case, the name of the plaintiffs is distinctly stated, and the law will presume it to be truly stated till the contrary appear, and cannot without a tax upon common sense, infer it to be the name of an individual or natural person. Nor will it presume it to be the name of an unincorporated company or partnership, who can sue only in their individual names; but of an incorporated company who have a right to sue in their incorporated name."

See, also, *Dutchess Cotton Manufactory* v. *Davis*, 14 Johns. (N. Y.) 238; *Henderson & Nashville R. Co.* v. *Leavell*, 16 B. Mon. (Ky.) 358; *Legnard* v. *Crane Co.*, 54 Ill. App. 149; *Mississippi, etc., R. Co.* v. *Gaster*, 20 Ark. 455; *Farmers' & Millers' Bank* v. *Sawyer*, 7 Wis. 379. We are of the opinion that the first ground of demurrer was properly overruled.

2. Should the declaration have contained an averment that said plaintiff had a license from the commissioner of insurance of Michigan to carry on its business in Michigan? The defendant relies on section 10467, 3 Comp. Laws, and sections 5123, 5133, 2 Comp. Laws. Sections 5123 and 5133 prescribe conditions under which foreign insurance companies can do business in this State.

Section 10467 reads:

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"But when, by the laws of this State, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act."

Assuming these sections to be applicable, the question presented by the demurrer is this: Must the declaration aver a compliance with their provisions? This question has not heretofore arisen in this court, but it has arisen in the highest courts of many of our sister States, and it is held by the great weight of authority that no such averment need be contained in the declaration or complaint, and that compliance with the law will be presumed. See *Sprague* v. *Lumber Co.*, 106 Ind. 242; *Nickels* v. *Saving Ass'n*, 93 Va. 380; *Langworthy* v. *Garding*, 74 Minn. 325; *Parlin & Orendorff Co.* v. *Boatman*, 84 Mo.App. 67; *Charles Roome Parmele Co.* v. *Haas*, 171 N. Y. 579; *Northern Assurance Co.* v. *Borgelt*, 67 Neb. 282; *American Ins. Co.* v. *Smith*, 73 Mo. 368; *Lehigh Valley Coal Co.* v. *Gilmore*, 93 Minn. 432. We are therefore of the opinion that the second ground of demurrer was properly overruled.

3. The third and fourth causes of demurrer may be considered together. To better understand the point there made, we quote from appellant's brief:

"Defendants are sued as joint obligors, and joint principals (though from the declaration it appears that one was a surety but not which one) without averring any joint condition to the obligation or any joint breach of it, though legally the judgment must go against both defendants or neither. Plaintiff having elected to bring an action against these defendants as joint obligors and principals in a bond, it devolves upon him to show a joint condition to the bond, and a joint breach of it."

This argument proceeds upon a misconception of the cause of action stated in the declaration. According to

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that declaration, the failure of appellant Eisenhardt to pay the plaintiff the moneys collected by him constituted a joint cause of action. In other words, plaintiff has averred a "joint condition in the bond and a joint breach of it." Moreover, it does appear from the declaration that appellant Eisenhardt was the principal in said bond and defendant Carpenter the surety therein.

Appellant also seeks to make the point that, in overruling the demurrer, the trial court used the term "order" whereas he should have used the term "adjudged." Assuming, but not deciding, that this point is open for review, we dispose of it by saying that it is entirely lacking in merit. The order complained of has precisely the same effect as though it contained the word "adjudged." Judgments may not be reversed for such technicalities, 3 Comp. Laws, § 10272, subd. 12.

The judgment is affirmed.

BLAIR, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

GOEBEL *v.* LOOK.[1]

1. WITNESSES—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.

   Upon summary proceedings by the trustee of an estate, against a tenant holding under a written lease made by plaintiff's decedent, defendant cannot testify to a verbal modification of the lease made by decedent and himself.

2. EVIDENCE—WRITTEN CONTRACT—LEASE—CHANGING BY PAROL.

   Upon summary proceedings to obtain possession of leased

[1] Rehearing denied September 15, 1908.

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premises for nonpayment of rent reserved by written lease, defendant cannot show a verbal modification of the lease postponing the time of payment.

Error to Wayne; Donovan, J. Submitted April 13, 1908. (Docket No. 40.) Decided June 27, 1908.

Summary proceedings by August Goebel, Jr., trustee of the estate of August Goebel, deceased, against William Look for the possession of certain leased premises. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

James H. Pound, for appellant.

Lewis A. Stoneman, for appellee.

MCALVAY, J. This action was brought by the trustee of the estate of August Goebel, deceased, against defendant before a circuit court commissioner for Wayne county, on April 26, 1907, to obtain restitution of certain premises leased by deceased during his lifetime under a written lease for a certain fixed term of five years, which provided that the rent should be "payable in monthly installments of thirty dollars ($30) each and every month in advance." The rent for January, February, March, and April, 1907, was claimed to be past due and unpaid. Judgment was rendered by the commissioner in favor of the plaintiff. Defendant appealed to the circuit court, where, upon proof made by plaintiff, and the defendant admitting that the rent was unpaid, the court directed a verdict in favor of the plaintiff. On the trial, defendant offered to show by his own testimony and that of his brother a verbal modification of the lease claimed to have been made by plaintiff's decedent with the defendant whereby for about four years following the rent was made payable "during the month." This was excluded by the court upon the ground that defendant could not testify at all as to matters equally within the knowledge of plaintiff's decedent,

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and that the terms of a written agreement could not be varied or changed by parol.

Upon both propositions the trial court was correct. These propositions are so well established that citation of authorities is unnecessary.

The judgment of the circuit court is affirmed, with costs.

GRANT, C. J., and BLAIR, MONTGOMERY, and CARPENTER, JJ., concurred.

In re COLBURN'S ESTATE.

MORE *v.* LUTHER.

1. JUDGMENTS—RES JUDICATA—MATTERS CONCLUDED.

   On the trial of a claim in behalf of a son, against the estate of his father, for services rendered on the father's farm, in reliance upon a promise that upon the death of the parents the farm should belong to the son, testimony tending to show that the father conveyed the farm to the son affords no basis for a verdict, where it has already been determined, in a suit between the heirs of the father and the heirs of the son, that no such conveyance was made.

2. WORK AND LABOR—PARENT AND CHILD—SERVICES—CONTRACTS—COMPENSATION—EVIDENCE.

   Statements by a father and mother, that their son, who was living with them and working on their farm, should have the farm at their death, constitute no evidence of an agreement that he should have the farm in payment for his services, neither do they afford evidence of a binding promise, being consistent with the thought that it was the purpose of the father and mother to give a gratuitous preference to their son at their decease.

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3. SAME—IMPLIED CONTRACT.

The relation of father and son prevents the implication of any agreement that the son should receive compensation for services rendered upon the father's farm while a member of his household.

4. SAME—EXPRESS CONTRACT—NONPERFORMANCE—IMPLIED CONTRACT.

Where it was agreed between father and son that if the son would work on the father's farm until the death of his parents he should have the farm, but the son died before his parents, it cannot be implied that the father agreed to pay what the son's services were reasonably worth.

5. EXECUTORS AND ADMINISTRATORS—ANCILLARY ADMINISTRATION—CLAIMS—WHERE PRESENTED.

Where ancillary administration proceedings are taken in this State, a claim arising here may be presented here, and the claimant is not obliged to present it in another State to the court having jurisdiction of the principal proceeding.

ON MOTION TO RECALL EXECUTION FOR COSTS.

EXECUTORS AND ADMINISTRATORS—ACTIONS—COSTS—ALLOWANCE AGAINST ADMINISTRATOR—STATUTORY PROVISIONS.

The legislature did not intend, by the provisions of section 9440, 3 Comp. Laws, to take from the courts the discretion as to costs conferred by section 681, 1 Comp. Laws, and sections 9891, 11275, 3 Comp. Laws; but in cases in which the court makes no special order for costs, in the exercise of its discretion, execution issues against the executor or administrator, in accordance with the provisions of section 9440.

Error to Kent; Wolcott, J. Submitted April 14, 1908. (Docket No. 66.) Decided June 27, 1908. Motion to recall execution for costs submitted September 10, 1908. (Calendar No. 22,707.) Denied October 5, 1908.

John E. More, administrator of the estate of Andrew K. Colburn, deceased, presented a claim against the estate of Reuben H. Colburn, deceased, for services rendered and for property wrongfully converted. The claim was allowed by the commissioners, and George E. Luther, ancillary administrator of said estate, appealed to the circuit court. There was judgment for claimant, and defendant brings error. Reversed.

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Thomas P. Bradford (*Chester W. Whitmore* and *Edmund H. Smalley*, of counsel), for appellant.

Elvin Swarthout (*John E. More*, of counsel), for appellee.

Reuben H. Colburn, deceased, was the father of Andrew K. Colburn, deceased. Reuben had other children, viz., two daughters somewhat younger than Andrew. Andrew was born in 1839. In 1866 Reuben, accompanied by his wife, Caroline, and his son, Andrew, moved onto a farm near the outskirts of Casnovia, Michigan. They resided there, constituting one household, from that time until the death of Andrew, which occurred in 1897. Two years thereafter, Reuben's wife, the mother of Andrew, died, and shortly thereafter Reuben went to live with one of his daughters in Illinois, where he resided until his death, which occurred February 8, 1903. Proceedings to administer his estate were instituted in Illinois. Ancillary administration was undertaken in the probate court of Kent county, Michigan. Andrew's administrator presented a claim against the estate of Reuben for the services of Andrew from 1866 until his death in 1897 and for certain personal property left by Andrew on his death and converted by Reuben. That claim was presented before the commissioners appointed in the ancillary proceedings in Kent county. The commissioners allowed the claim, and from their allowance an appeal was taken to the Kent circuit court. There it was tried by a jury who rendered a verdict in claimant's favor. The claim for services was based upon the ground that they were rendered in reliance upon the promise of Reuben that at the death of himself and wife the farm should belong to Andrew. Testimony was introduced tending to prove that Reuben actually did convey this farm to Andrew. This testimony afforded no basis for a verdict. For if this farm had been conveyed it belonged to the heirs of Andrew, and it had already been determined in a chancery proceeding instituted by those heirs against the heirs of Reuben that such

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conveyance was not made. We regard that determination as conclusive and binding upon the parties interested in this litigation. The testimony also showed that Reuben shortly after the death of his wife entered into an agreement with his two daughters whereby the farm in question was deeded to them in undivided shares in consideration of their agreement to support and maintain him during the remainder of his life. Defendants offered to prove that on Andrew's death Reuben and his mother "had no other property than this farm in question and the personal property" connected therewith, "and the proceeds of that farm and that personal property were reasonably requisite and necessary for the maintenance of them during the remaining years of their life." This testimony was excluded. The issue was submitted to a jury, who were permitted to, and it is to be inferred did, give a verdict for the reasonable value of the services performed by Andrew and of certain personal property left by him at his death.

CARPENTER, J. (*after stating the facts*). 1. The first and most important question raised in this case is whether there was any testimony which warranted the claim for services to be submitted to the jury. As we have already stated, the testimony indicating that the farm had been conveyed to Andrew must be disregarded. That issue was determined against the heirs of Andrew in another suit.

Statements made by Reuben and his wife that Andrew should have the farm at their death were testified to by many witnesses. Some of these statements were made in the presence of Andrew, some of them when he was not present. Under our decisions they constitute no evidence of an agreement. They afford no evidence of a binding promise. They are consistent with the thought that it was the purpose of the father and mother to give a gratuitous preference to their son on their decease. See

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Decker v. *Kanous' Estate*, 129 Mich. 146: *Rodgers* v. *Lamb's Estate*, 137 Mich. 241. The relation of father and son existing between Reuben and Andrew prevents the implication of any agreement that the latter should receive compensation for his services. As stated by Justice COOLEY in *Mason* v. *Dunbar*, 43 Mich. 407:

"They were father and children * * * living together as a family, and receiving mutual benefit and comfort from their association, and from the property which they enjoyed in common. No presumption can arise under such circumstances that claims were to be made by either against another for services, or for the ordinary conveniences of life which were furnished. On the contrary, we must presume that the parties were residing together on the usual terms of members of one family, and not under any contract relations."

There can be no recovery in such a case unless the evidence proves that the services were rendered and received under an agreement assented to by both parties requiring compensation. *Decker* v. *Kanous' Estate*, supra, and cases there cited.

Is there any testimony in the record warranting the inference that any such agreement was made? If there is, it is the following testimony given by witness Jacob H. Shaw:

"The old gentleman told me that Andrew was to have the farm when they were done with it. And the old lady told me the same thing. He said that Andrew was to work on the place the same as they did. This conversation was before Andrew's death. I had two or three such conversations. I could not tell exactly, a good many years ago. Andrew was present once. The first time we had a conversation they were all three together. This talk with the old folks about the property was sometime along in the seventies."

The foregoing statement of Reuben and his wife that Andrew was to have the farm when they were done with it obviously means—and this is conceded—that he was to have it on their death. If this statement stood alone it would, as already shown, furnish no evidence of an agree-

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ment. It furnishes such evidence only because by the testimony it is connected with the statement that "Andrew was to work on the place the same as they did." If these two statements are related—and upon no other theory can an agreement be predicated upon them—the latter statement means that Andrew was to work upon the farm until the death of his father and mother. It follows that, if the foregoing testimony warrants the inference of any agreement, that agreement is this, viz., that in consideration of Andrew's work on the farm until the death of Reuben and his wife, he shall receive the farm as compensation for his services. This agreement was clearly made upon the assumption that Andrew should outlive Reuben and his wife. That assumption proved unfounded. Andrew died before either of his parents. Can it be inferred from the testimony above quoted that there was any agreement to compensate Andrew for his services rendered under these circumstances? It was held in the trial court that it could, and that the estate of Reuben was bound to pay Andrew what his services were reasonably worth. It is insisted that this conclusion was warranted by *In re Williams' Estate*, 106 Mich. 490, and *Sammon* v. *Wood*, 107 Mich. 506. In each of these cases an agreement was proved substantially like that in the case at bar, but it was also proved that the claimant rendering services fully performed his agreement and that the father for whom those services were performed refused to make the conveyance as agreed, and it was held that this refusal made his estate liable to pay the reasonable worth of the services rendered. The difference between those cases and the case at bar is manifest. There the estate was compelled to pay the reasonable worth of the services rendered as a penalty for the refusal of the decedent to perform his contract. This was a just and equitable decision. Any other conclusion would have enabled the estate of decedent to evade the obligations imposed upon it by the contract he had entered into. The principle of those cases has no application here.

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Claimant never performed the contract between him and his father, and his father never failed to perform it. Upon what principle then can he recover the reasonable worth of his services? He cannot recover upon the contract he made with his father, because he did not perform that contract. Neither can he recover upon the basis of an implied contract deducible from the rendition and acceptance of his services under the authority of *Allen* v. *McKibbin*, 5 Mich. 449. There we held that though a party cannot recover upon a non-apportionable contract which he has not performed, he may "where anything has been done from which the other party has received substantial benefit, and which he has appropriated, recover upon the quantum meruit based on that benefit, and the basis of this recovery is not the original contract, but a new implied agreement deducible from the delivery and acceptance of some valuable service or thing." That principle can have no application in this case because, as we have already shown, the law will permit no agreement to be implied from the rendition and acceptance of claimant's services.

No obligation rests upon the estate of Reuben to pay the reasonable worth of the services of Andrew unless that obligation arises from their agreement. For outside of that agreement there is no such obligation. From that agreement may it be inferred that Reuben was under obligation to pay the reasonable worth of Andrew's services in the event of his surviving Andrew? The agreement, as already stated, is that Reuben will give Andrew his farm at the death of himself and wife if Andrew will work for him until that event occurs. According to this agreement, the compensation of Andrew is not based upon the reasonable worth of his services. Reuben and his wife might die in a few days. In that event Andrew would receive much more than the value of his services. They might live for many years, and in that event Andrew would receive less than the value of his services. For the contingency which actually occurred, viz., Andrew's

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death before Reuben's, no provision whatever was made. May it be inferred that it was the intention of the parties that in such a contingency Reuben should pay Andrew's estate what his services were reasonably worth? In that event, though payment might be postponed until his death, Reuben would hold his property burdened with the obligation to pay this claim. To the extent of this claim he would be prevented from using that property for the maintenance of himself and wife during their remaining years. This would prevent his making the agreement he did make, viz., to convey the farm to his other children in consideration of their supporting and maintaining himself the remainder of his life. This would lead to very serious consequences, as shown by this case. For, as heretofore indicated, the testimony offered by contestants and excluded by the trial court would have shown that all this property was necessary for the maintenance of Reuben and his wife during their remaining years. It is scarcely necessary to say that neither Reuben nor Andrew intended that their agreement should apply in such a contingency. For the terms of that agreement clearly indicate that the right of Andrew in the farm should be subordinate to its use for the maintenance of his father and mother. I think it may also be stated that, from their agreement, it may not be inferred that either Reuben or Andrew intended, in the contingency of the former outliving the latter, the estate of the former should be fettered or burdened in any way by the claim of the latter. If they had had any such intention it is to be presumed that they would have expressed it in some way and made some equitable provision for a mutual protection of their rights. In the absence of an agreement, Andrew was entitled to no compensation for his services. The agreement provided for compensation in a certain contingency and in that contingency only. That contingency did not occur, but another and an altogether different one occurred. No principle of law or equity will permit the agreement to be applied to such a contingency, and it may not be

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presumed that the parties intended it to apply. It follows from this reasoning that there was no testimony in the case tending to show an obligation on the part of the estate to compensate Andrew for his services.

2. Personal property. The claim for personal property, as I understand it, is this: That at the death of Andrew there was personal property upon the farm of two classes; (*a*) certain property owned by Andrew which, after his death, was sold and the proceeds used by Reuben; and (*b*) certain property belonging to Reuben which, on the death of himself and wife, was to become Andrew's if he worked for them until that event occurred. For this latter property there can be no recovery under the principles of this opinion. The property of Andrew is obviously subject to a different rule. For that there can be a recovery.

3. In behalf of the estate of Reuben, the point is made that the claim in question should have been presented before the court in Illinois where the principal proceedings to administer the estate were taken, and that it could not be presented in Michigan where the ancillary proceedings were taken. This point is not well taken. The claim in question arose in Michigan and was in every respect a Michigan claim. The assets of the estate in Michigan were justly subject to that claim, and it is as objectionable from a legal standpoint (see 18 Cyc. p. 1233) as from the standpoint of good sense to compel the claimant to resort to the courts of Illinois to litigate his claim which if paid must be paid from the property situated in this State.

4. Rulings relative to the admission and exclusion of testimony. Under this head appellants present many objections. Nearly all of those objections relate to rulings which arose from the claim that Andrew was entitled compensation for his services. As we have already determined that that claim must be disallowed, we see no reason for considering these objections. We think that this opinion sufficiently indicates the course to be taken upon a new trial.

Judgment reversed, and a new trial ordered.

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BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

ON MOTION TO RECALL EXECUTION FOR COSTS.

Motion to recall execution for costs of this court against John E. More personally and to amend the judgment entry by adding thereto the following clause, namely:

"And that such costs be a charge against the estate of said Andrew K. Colburn and payable out of the said estate in due course of administration and not against the individual goods and estate of said John E. More."

BLAIR, J. The principal case, in which the motion is made, is reported ante, 206. The subject-matter of the litigation between the parties is fully set forth in the principal case. Prior to the decision of the case, mandamus proceedings were instituted by appellant, administrator of the estate of Reuben H. Colburn, to require the Kent circuit judge to amend the judgment rendered upon the trial of the probate appeal in the Kent circuit "so as to make the costs payable out of the estate and not payable by said relator personally." He also asked the respondent to stay execution against the relator individually and personally, pending the final decision in this court, upon relator giving bond to the claimants in double the amount of the costs taxed; each of which motions was denied by the circuit judge. It was held by this court that the claim that respondent erred in rendering judgment for costs against relator personally could not be reviewed by mandamus but could only be reviewed on error. *Luther* v. *Kent Circuit Judge*, 151 Mich. 71.

In their brief in the principal case, counsel argue at length the point whether the circuit judge erred in entering judgment against the administrator personally, the only difference between the arguments then presented and the arguments now presented being that each counsel now strenuously insists that the position taken by his adversary was correct and adopts the adversary's brief as his brief

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upon this motion. The question was not passed upon in the principal case, for the reason that the judgment was reversed and a new trial granted.

We are of the opinion that the legislature did not intend, by the provisions of section 9440, 3 Comp. Laws, to take from the courts the discretion as to costs conferred by section 681, 1 Comp. Laws, and sections 9391, 11275, 3 Comp. Laws. *Van Wert* v. *Chidester*, 31 Mich. 207; *Cheever* v. *North*, 106 Mich. 390; *Brilliant* v. *Wayne Circuit Judges*, 110 Mich. 68; *Dodge* v. *Stanton*, 12 Mich. 408.

In cases, however, where the court makes no special order as to costs, in the exercise of its discretion, execution issues against the executor or administrator, in accordance with the provisions of section 9440.

We, therefore, hold that the execution for costs of this court was properly issued against relator, and we see no sufficient reason for amending the judgment entry and recalling the execution.

Application denied.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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VELTHOUSE v. ALDERINK.

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SEDUCTION—CIVIL ACTION—DECLARATION—VARIANCE—RAPE.

In an action for seduction brought under section 10418, 3 Comp. Laws, by the injured female, by her next friend, the declaration and proofs making a case of rape, a judgment for plaintiff is affirmed; Mr. Justice MONTGOMERY, with whom concur the Chief Justice and Mr. Justice BLAIR, writing for affirmance on the ground that though the reference to the statute cannot be treated as surplusage, the action may be maintained notwithstanding the intercourse was had by force and against the will of the plaintiff; and Mr. Justice CARPENTER, with whom concurs Mr. Justice MCALVAY, writing for affirmance on the ground that, though plaintiff had no right to bring suit for rape under the statute, the reference to the statute may be treated as surplusage, and the declaration sustained as a common-law declaration for assault.

Error to Ottawa; Padgham, J. Submitted April 15, 1908. (Docket No. 76.) Decided June 27, 1908.

Case by Fanny Velthouse, by next friend, against Henry Alderink for seduction. There was judgment for plaintiff, and defendant brings error. Affirmed.

Walter I. Lillie, for appellant.

Farr & Farr, for appellee.

MONTGOMERY, J. The plaintiff, in an action in which she counted on section 10418, 3 Comp. Laws, recovered a judgment of $1,350 against the defendant, and the case has been brought here for review on error. But a single question was raised. The point was made at the close of the testimony of the plaintiff and again in the request to charge, and, in the language of the bill of exceptions, is stated as follows:

"The defendant, by his attorney, requested the court to instruct the jury in substance that the action was one

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on the case for seduction, and brought under section 10418 of the Compiled Laws of 1897; that to constitute seduction there must be a consent to the sexual intercourse by the woman; that the declaration alleged the intercourse to have been without the consent of the plaintiff and against her will; that the proof failed to show that plaintiff consented to the intercourse, but, on the contrary, that she refused to yield to the claimed persuasions and entreaties of the defendant, and that the sexual intercourse between her and the defendant, if any was had, was effected without her consent and against her will; and that therefore the plaintiff could not recover in this case and the verdict of the jury should be no cause of action."

It will be noted that no other question relating to the pleadings in the case is raised than that an action for seduction cannot be predicated upon intercourse brought about by force and against the will of the plaintiff. We shall deal only with the precise question raised. Other questions that might present themselves upon the record are not discussed.

At the argument, it was suggested to counsel that in any event the declaration averred facts sufficient to make a case, and that any irregularity in the appointment of a next friend would be obviated by a plea of the general issue. This would undoubtedly be true in any ordinary action, and it has been so held in the two cases of *Sick* v. *Michigan Aid Ass'n*, 49 Mich. 50, and *McDonald* v. *Weir*, 76 Mich. 243.

The present case, however, presents a somewhat different question. The declaration counts on the statute, section 10418, 3 Comp. Laws, and this would seem to fix the character of the action, and *Ryan* v. *Fralick*, 50 Mich. 483, seems inconsistent with the suggestion that this reference to the statute may be treated as surplusage.

This brings us to a consideration of the question whether, in an action for seduction brought on behalf of the seduced party, where the other elements are present—and it is not claimed in this case that they are not present—the action may be maintained notwithstanding the intercourse was had by force and against the will of the plaintiff.

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The question has been before this court in a number of cases where the action was brought by the father, and where the action was predicated upon the statute for seduction. The court has held in these cases that the fact that force is employed is no bar to recovery. See *Dalman* v. *Koning*, 54 Mich. 320; *Johnston* v. *Disbrow*, 47 Mich. 59; *Watson* v. *Watson*, 53 Mich. 168; *Stoudt* v. *Shepherd*, 73 Mich. 588. A summary of the preceding cases is found in *Stoudt* v. *Shepherd*, at page 597, as follows:

"The case of *Dalman* v. *Koning*, 54 Mich. 320 (in this respect following *Johnston* v. *Disbrow*) held that, as the unlawful intercourse was the ground of action, the use of force did not negative the legal idea of seduction, and a recovery could be had for all the wrong and its consequences. It had already been held in *Watson* v. *Watson*, 49 Mich. 540, that two counts, one involving an assault and the other enticement, were not inconsistent with the same statutory theory, and did not make a double charge."

It would seem from this that the gravamen of the charge is debauching the plaintiff, and that it is not open to the defendant to assert that the means by which this was accomplished was force rather than the usual arts and persuasions of the seducer. So in *Watson* v. *Watson*, 53 Mich. 168, in referring to this subject, it is said:

"The plaintiff's evidence did not make out a rape; it made out only that her will was overcome by the defendant's superior will, which had controlling influence because of the parental relation which he had assumed towards her. If the case were in fact one of rape, there would be very good authority for holding that the action might be sustained notwithstanding the fact that the intercourse was accomplished by force." Citing *Kennedy* v. *Shea*, 110 Mass. 147, and *Lavery* v. *Crooke*, 52 Wis. 612.

The only case to which our attention has been directed in which the precise point has been considered is the case of *Marshall* v. *Taylor*, 98 Cal. 55, in which the evidence, from one viewpoint, indicated that the plaintiff lost con-

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sciousness from the effect of wine at the time the act was committed, and it was said:

"If this be so, the defendant was guilty of rape, and while it is held in those States where seduction is a criminal offense that proof of a rape will defeat a prosecution for seduction," citing authorities, "yet no case is found in the books where a party has failed to recover in damages for seduction when the evidence at the trial disclosed the defendant guilty of the more heinous offense of rape. Such a showing but aggravates the injury, and furnishes ample ground for exemplary damages. * * * It does not lie in the mouth of the defendant to say: 'I am not liable to pay any damages in this action, because the evidence discloses I did not seduce the plaintiff, but committed the atrocious crime of rape.' * * *

"Where a parent sues for seduction of his daughter, and consequent loss of service, and it appears that the intercourse was accomplished by force, such a showing will not defeat the action, but will aggravate the injury. (*Furman* v. *Applegate*, 23 N. J. Law, 28; *Kennedy* v. *Shea*, 110 Mass. 147; *White* v. *Murtland*, 71 Ill. 250). While the recovery of the parent is based upon a different principle from that involved where the female is the complainant, yet we see no bad effect to follow an application of the same rule in her case. Certainly a court will not be astute in drawing fine distinctions from the evidence in order to discover a case of rape, if such fact would defeat a recovery. For the foregoing reasons we conclude that, if plaintiff was unconscious from the effects of the wine at the time defendant had intercourse with her, her cause of action was not defeated by reason of such fact."

As was stated in *Stoudt* v. *Shepherd*, 73 Mich. 588, our statutes have removed from such actions all the rubbish that disfigured them, from attempting to keep up an idea that their idea was to collect damages for loss of service, when in fact that was never more than a legal fiction. We are satisfied with the reasoning of the supreme court of California and are disposed to follow it.

The judgment will be affirmed.

GRANT, C. J., and BLAIR, J., concurred.

CARPENTER, J. Plaintiff's declaration is as follows:

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"Lida Velthouse, mother of Fanny Velthouse, a minor of the age of twenty years, plaintiff in this suit, for and in behalf of her said minor daughter, Fanny Velthouse, the father of the said Fanny being dead, by Farr and Son, her attorneys, comes into this court in and for the said Fanny Velthouse, and as her mother in and by virtue of the provisions of section 10418 of the Compiled Laws of this State of 1897, and complains of Henry Alderink, defendant herein, of a plea of trespass on the case:

"For that whereas, the said defendant, contriving, and wrongfully, wickedly and unjustly intending to injure the said Fanny Velthouse, and to deprive her of the comfort, fellowship, society and respect of her friends and relatives and of the community in which she lived, and to bring her into great discredit, dishonor and disgrace, and to ruin her good name and fame in the community where she resided, heretofore, to wit, on the sixth day of October, 1906, at the township of Allendale, in said county, violently and without the consent of the said Fanny Velthouse, seized her and threw her upon the ground, and then and there debauched and carnally knew her, the said Fanny Velthouse, and against her will, whereby the said Fanny Velthouse became pregnant and sick with child, and so remained and continued for a long space of time, to wit, for the space of nine months then next following, at the expiration whereof, on, to wit, the 20th day of June, 1907, was delivered of the child with which she was so pregnant, as aforesaid, to wit, at the township of Allendale, at the time aforesaid, by means of which said several premises the aforesaid Fanny Velthouse suffered great and extreme pain, and experienced great suffering, and was greatly humiliated and disgraced, and was deprived of the comfort, fellowship, society and respect of all her friends and relatives, and of the community in which she lived, and was ruined and brought into great infamy and reproach, and has been greatly injured and damnified by the premises, to the damage of the said Fanny Velthouse of ten thousand dollars, and therefore this suit is brought in her behalf as aforesaid."

To this defendant pleaded the general issue, entitling his plea, "Fanny Velthouse v. Henry Alderink." The issue was tried by a jury and the testimony of the plaintiff introduced without objection. She testified in accordance with the averments of the declaration that the inter-

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course was brought about by force and without her consent. At the conclusion of the case defendant requested the court to direct a verdict in his favor upon the ground:

"That the action was one on the case for seduction and brought under section 10418 of the Compiled Laws of 1897; that to constitute seduction there must be a consent to the sexual intercourse by the woman; that the declaration alleged the intercourse to have been without the consent of the plaintiff and against her will; that the proof failed to show that plaintiff consented to the intercourse, but on the contrary * * * that the sexual intercourse between her and the defendant * * * was effected without her consent and against her will."

The court refused to give this request and submitted the issue to the jury who rendered a verdict in plaintiff's favor. The refusal to give the foregoing request is the only ground relied upon for reversal of the judgment.

Can this suit be maintained under section 10418, 3 Comp. Laws? This suit is not the suit of Lida Velthouse, the mother. It is the suit of Fanny herself to recover her damages, and Fanny is the real plaintiff, and it is so understood by defendant's counsel. In his brief it is stated, "it is just the same as if the plaintiff [Fanny] had brought the action herself."

Section 10418, 3 Comp. Laws, provides:

"It shall not be necessary in any action on the case for seduction hereafter to be brought, to allege in the declaration, or to prove on the trial, any loss of service in consequence of such seduction; but if the female seduced be a minor at the time of the seduction, the action may be brought by her father, mother, or guardian; and if such female be of full age, the action may be brought by her father, or any other relative who shall be authorized by her to bring the same."

Before this statute was passed the seduced woman had no right of action. But now she has. This statute gives her a right of action which she may enforce in her own name. *Watson* v. *Watson*, 49 Mich. 540. But does it give her a right of action if the intercourse is entirely ac-

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complished by force and against her will? If the intercourse is accomplished in part by force and in part by seductive arts, the case is one of seduction and within the statute. *Watson* v. *Watson*, 53 Mich. 168. But that is not this case. If the case of the plaintiff, as averred in the declaration and established by the testimony, is one of seduction, it would be a most equitable doctrine—though its legality may be open to question—to say that the defendant should not be permitted to avoid responsibility by proving that he committed the more heinous offense of rape. But that is not this case. Here the case made by plaintiff's declaration and by her testimony is one of rape. I cannot assent to the proposition that rape is seduction, or that the statute intended to cover the case of rape. There was no need for a statute in such a case, because the principles of the common law afforded ample remedy. And it may also be added that to cover the contingency of the testimony proving a case of rape the pleader may have two counts; one charging rape, one seduction. *Watson* v. *Watson*, 49 Mich. 540. See, also, *Bellant* v. *Brown*, 78 Mich. 294. We are referred to many cases holding that the action may be maintained, though the intercourse relied upon was accomplished by force and violence. *Kennedy* v. *Shea*, 110 Mass. 147; *Lavery* v. *Crooke*, 52 Wis. 612; *Damon* v. *Moore*, 5 Lans. (N. Y.) 454. Each of these cases was brought by a father to recover compensation for damages resulting from his child being debauched. In those cases, as stated in *Kennedy* v. *Shea*, supra, "the gist of the action is the debauching of the daughter and the consequent supposed or actual loss of her services." In other words, in those cases, it was not necessary to prove seduction. It is otherwise however in this case where the seduced female herself brings the suit. In such cases, as we have held in *Greenman* v. *O'Riley*, 144 Mich. 534, a case of actual seduction must be established, and by that is meant,

"The act of persuading or inducing a woman of previous chaste character to depart from the path of virtue

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by the use of any species of arts, persuasions, or wiles, which are calculated to have, and do have, that effect, and resulting in her ultimately submitting her person to the sexual embraces of the person accused."

Marshall v. *Taylor*, 98 Cal. 55, is more nearly in point. There the seduced female herself brought the action. The testimony showed that the illicit intercourse took place immediately after the plaintiff had drunk a glass of wine handed her by defendant. Her testimony was open to two constructions; one that the intercourse occurred while she was unconscious from the effect of the wine; and the other that she was conscious and was induced to yield her consent by reason of defendant's seductive promises. Plaintiff recovered a verdict and judgment in the trial court. Defendant asked the trial court to reverse that judgment upon the ground that plaintiff's evidence did not establish a case of seduction. The supreme court decided otherwise, saying, "assuming her to have been conscious at the time the act of intercourse took place, and assented thereto," she was seduced. And it was also held that defendant could not escape responsibility because the evidence disclosed him guilty of the more heinous crime of rape. In that case, assuming plaintiff to have been unconscious at the time the illicit intercourse occurred, she had, under a declaration alleging seduction, recovered damages for a rape. Inasmuch as she had a right to recover such damages on common-law principles, the only possible valid objection that could have been made was one of variance, viz., that she had been permitted to recover on a cause of action different from that stated in her declaration. No such objection was made, and that point was not considered by the supreme court. The objection was that plaintiff could not recover, not because of variance, but because there was no proof of seduction. It was a complete answer to that contention to say, as the court did say, that though the testimony established a case of rape, it would not defeat recovery. In that case plaintiff recovers, not because she proved

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seduction—the cause of action averred in her declaration —but because she proved another and a very different cause of action, viz., rape. And the court was quite correct, under a record which disclosed no objection upon the ground of variance, in saying that this was no defense. In other words, *Marshall* v. *Taylor* does not decide that rape is seduction. Nor that rape can be proved under a declaration averring seduction. It merely holds that on that record—a record disclosing no objection on the ground of variance—it was of no avail for defendant to say that the testimony proved rape instead of seduction. Had such an objection been made, a different question would have been presented, and we are not informed how that question would have been determined. I am therefore of the opinion that *Marshall* v. *Taylor* is not an authority for the proposition that the plaintiff in this case had a right to bring suit for rape under section 10418, 3 Comp. Laws, and, as already stated, I think she had no such right.

It does not follow, however, that plaintiff should be defeated in this action. Upon common-law principles she had a right to maintain an action and recover damages for the assault committed upon her. The declaration in this case states every essential element to entitle her to recover under common-law principles. It is true that it states something more, viz., it says that she brings this action by virtue of the provisions of section 10418, 3 Comp. Laws. If I am right in my reasoning, she could not bring it by virtue of that section. Defendant contends and has always contended that she could not bring it by virtue of that section. In my view of the case and in his view of the case this reference to the statute was a surplusage. Why should it defeat recovery? It was an averment of a proposition of law which was unsound. It did not deceive the defendant. It had no effect upon the trial; it was a mere surplusage and should be disregarded.

In 21 Enc. Pl. & Prac. p. 293, it is said:

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"Averments of legal conclusions and inferences which do not correctly state the law applicable to the facts, but are repugnant to it, are not material, and will neither vitiate a good pleading nor cure one that is defective."

In support of this statement a number of cases are cited, one of which, *Parnaby* v. *Lancaster Canal Co.*, 11 Ad. & El. 223, is very similar to the case at bar.

"This [as stated in the opinion of the lower court] was an action on the case for negligence in leaving a sunken barge in the defendant's canal which the plaintiff's vessel ran against and was thereby sunk."

In the declaration it was averred that the duty of defendant to remove the sunken vessel arose from a certain act of parliament therein set forth. After verdict and judgment in favor of plaintiff, the case was reviewed by a writ of error. The proposition there raised and decided is shown by the following quotation from the opinion of Tindal, C. J.

"The principal objection in this case was, that the clause recited in the declaration, and which is therein stated to have cast a duty on the company to remove the obstruction caused by the sunken boat, was not obligatory, but was an enabling or permissive clause only. And we are all of that opinion. Neither the clause recited, nor anything in the act of parliament contained, imposes such a duty on the defendants below; and the allegation in the declaration, as to the duty of the company, seems to have been founded on a mistake as to the true meaning and effect of that clause.

"But, admitting this to be so, the question then arises, whether, upon the facts stated in the declaration, another duty of a different kind was not imposed by the common law upon this company; and whether a sufficient breach of that duty is not alleged. It is clear that the statement of the duty in the declaration is an inference of law from the facts, and need not be stated at all, or, if improperly stated, may be altogether rejected. Omitting, therefore, as it appears to us, the improper and unfounded statement of duty in the declaration, the facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company; and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair

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the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap door open without any protection, by which his customers suffer injury," and the judgment was affirmed.

I think it may also be said that the *Parnaby Case* is in harmony with our own decisions. *Smith* v. *Holmes*, 54 Mich. 104. See, also, *Attorney General* v. *Michigan State Bank*, 2 Doug. (Mich.) 359; *Holdridge* v. *Farmers' & Mechanics' Bank*, 16 Mich. 72.

It is said that, considered as a common-law declaration, there was an irregularity in the appointment of a next friend. It is to be observed that defendant as well as plaintiff has treated the mother of plaintiff as her next friend. The objection to the regularity of her appointment is one which cannot now be made. *Sick* v. *Michigan Aid Ass'n*, 49 Mich. 50; *McDonald* v. *Weir*, 76 Mich. 243.

It is said that *Ryan* v. *Fralick*, 50 Mich. 483, is inconsistent with the thought that the reference to the statute may be treated as surplusage. To this I cannot agree. It is true in that case it was held that the declaration was based on the statute, section 10418, and could not be regarded as a common-law declaration. But it could not be said there as here that the declaration on its face showed that the reference to the statute was erroneous. That declaration could not be treated as a common-law declaration, because, unlike the one in this case, it did not contain the essential elements of a common-law declaration.

Holding, as I do, that under defendant's contention the declaration is a common-law declaration, the judgment must be affirmed.

MCALVAY, J., concurred.

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TURNBULL *v.* JOHNSON.

WILLS — CONSTRUCTION — INTERESTS CREATED — PERSONAL PROPERTY.

Where testator devised all his real and personal property to his wife "to be hers absolutely during her lifetime, and at her death what of the same might be left to" his two sons and their heirs, and his widow became sole executrix, she had absolute and unlimited power to dispose of shares of stock belonging to the estate and pledged to secure an indebtedness; and the sons, though they executed a bill of sale purporting to transfer their interest, had no interest in the stock upon which to found a bill to cancel the sale on the ground of fraud practiced upon them by the purchaser.

Appeal from Alpena; Emerick, J. Submitted April 16, 1908. (Docket No. 104.) Decided June 27, 1908.

Bill by Burt L. Turnbull and another against William H. Johnson and others to set aside the sale of certain stock on the ground of fraud. From a decree dismissing the bill, complainants appeal. Affirmed.

Reilley & McPhee (*Henry K. Gustin*, of counsel), for complainants.

Joseph H. Cobb, for defendant Johnson.

Complainants are the sons of James D. Turnbull, deceased. Said James D. Turnbull died September 19, 1900. His will, which was duly admitted to probate, devised all his real and personal estate to his "wife, Franc A. Turnbull, to be hers absolutely during her lifetime, and at her death what of the same might be left to my two sons, Burt L. Turnbull and Jay D. Turnbull, share and share alike, and their heirs forever."

The widow, Franc A. Turnbull, became sole executor of the will. Among the assets of the estate of James D.

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Turnbull were 210 shares of the capital stock of the Alpena City Water Company and 480 shares of the Alpena Electric Light Company. These shares were pledged to the Alpena National Bank as security for an indebtedness exceeding the value of the stock. Early in 1902 defendant Johnson purchased said stock. He procured the title of the bank to which they were pledged. He also acquired the interest of the estate of James D. Turnbull, deceased, and the interest of Franc A. Turnbull. The complainants themselves executed a bill of sale purporting to transfer their interest. On the 29th of April, 1905, complainants filed this bill averring that defendant Johnson, in purchasing said stock, practiced a fraud upon them, and praying relief therefor. Defendants answered. The case was heard on testimony taken in open court and a decree entered dismissing complainants' bill. From that decree an appeal is taken to this court.

CARPENTER, J. (*after stating the facts*). The only ground upon which complainants seek relief is that *they* were defrauded by the purchase of this stock. It is a complete answer to this claim to say that complainants had no interest whatever in said stock. The will of their father made that stock the absolute property of their mother. See *Jones* v. *Jones*, 25 Mich. 401; *Dills* v. *La Tour*, 136 Mich. 243; *Killefer* v. *Bassett*, 146 Mich. 1; *Moran* v. *Moran*, 143 Mich. 322.

Their mother had the absolute and unlimited power of disposing of this stock as she chose. Complainants' assent to its transfer was entirely unnecessary and added nothing whatever to the title acquired by defendant Johnson. It is scarcely necessary to say that they are in no position to complain that fraud was practiced upon them. They cannot predicate relief upon that ground. If any fraud was practiced, the only ones affected thereby would be the bank or Franc A. Turnbull, personally, or as the executor of her husband's estate. Neither the bank nor Franc A. Turnbull complain. Nor do com-

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plainants seek relief upon the ground that the bank was defrauded, that their mother was defrauded, or that their father's estate was defrauded. Nor is there evidence upon which relief could be granted on any such ground.

From our disposition of the case it is not to be inferred that defendant Johnson was guilty of unconscionable conduct. Our view of the case does not require us to enter into an examination of the testimony upon that subject.

The decree is affirmed.

GRANT, C. J., and BLAIR, MONTGOMERY, and MCALVAY, JJ., concurred.

G. S. BLAKESLEE & CO. *v.* REINHOLD MANUFACTURING CO.

1. SALES—CONTRACT—CONSTRUCTION.
   A contract to furnish certain ice chopping machines on consignment, and an addition thereto providing for the sale of certain other machines of similar use, examined, and *held*, that the addition to the contract stated its own terms of payment and did not adopt the provisions of the original contract.

2. TRIAL—INSTRUCTIONS—MISSTATEMENT OF TESTIMONY.
   An instruction stating that plaintiffs had testified to a certain matter is properly refused where the most that could be said is that plaintiffs had testified to certain admissions on the part of defendants from which such an inference could be drawn.

3. SAVING QUESTIONS FOR REVIEW — REASONS FOR RULING — EXCEPTIONS—NECESSITY.
   Error in overruling a motion for a new trial cannot be considered where no reasons were given for the ruling and no exceptions were taken.

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Error to Wayne; Mandell, J. Submitted April 15, 1908. (Docket No. 89.) Decided June 27, 1908.

Assumpsit by G. S. Blakeslee & Company against the Reinhold Manufacturing Company for the breach of a contract for the sale of certain machines. There was judgment for defendant, and plaintiff brings error. Affirmed.

E. T. Berger, for appellant.

Thomas Mulvihill and *Thomas W. Fitzsimmons*, for appellee.

BLAIR, J. On the 3d day of November, 1902, the parties to this suit entered into an agreement whereby the defendant, Reinhold Manufacturing Company, agreed to furnish and sell exclusively for one year to plaintiff, G. S. Blakeslee & Company, "their machine, known as the 'Reinhold Ice Chopper,' upon which patents are pending in the United States, on consignment, to the party of the second part at the following price, to wit: Twenty-one ($21) dollars for each and every machine delivered to the party of the second part." The agreement contained further provisions, as follows:

"Said parties further agree that at the end of one (1) year from date hereof they expressly give the said party of the second part the privilege and option of renewing this contract for the further period of two (2) years on the same terms. * * *

"In and for the consideration of the above promises and covenants, the party of the second part agrees that as soon as it has sold or disposed of any machine, delivered to it by the parties of the first part, it will within thirty (30) days from the date of such sale, pay the parties of the first part the sum of twenty-one ($21) dollars for each and every machine together with the amount of freight advanced by the parties of the first part in delivering said machines f. o. b. to either of the above destinations by the party of the second part. * * *

"The party of the second part further agrees that it

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will devote its best efforts to promote the sale of said machines and will do everything in its power to increase the sale thereof and to aid the parties of the first part in disposing of their product."

In February, 1903, the following writing was executed by the parties:

"This is an addition to the original contract made by Frank J. Reinhold and Alexander H. Reinhold and the G. S. Blakeslee Co., February, 1903.

"The first party hereby agrees to furnish the said second party their Gem ice choppers on the following terms, for one year from date. Price is to be twelve ($12) dollars less five (5%) per cent. in thirty (30) days and half freight allowed in Chicago.

"Said first party also agrees to furnish to said second party their cube machines on the following terms for one year. Price to be forty-five ($45) dollars f. o. b. Detroit for the term of six (6) months. After that date the said first party is to receive an additional twenty-five ($25) dollars, if the machine is then found satisfactory."

September 1st, 1903, the plaintiff company gave notice of the exercise of their option to renew the contract for the further period of two years, as follows:

"The contract which we have with you under date of November 3d, 1902, for the exclusive sale of your ice machine, will soon have run its first year and we therefore desire to exercise the option given us in said contract for a renewal of a further period of two years, by advising you that we wish to so renew it on the same terms and conditions."

The parties having got into difficulty with reference to the performance of the contract, in November, 1905, the Reinhold Manufacturing Company began suit in the justice's court for the city of Detroit against G. S. Blakeslee & Company to recover from it a balance claimed due, filing a bill of particulars of its claim amounting to $589.04, upon which amount there was credited to the Blakeslee Company $154, as follows: "Allowance for selling machines: 16 No. 1 choppers at $7 each, $112;

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12 Gems at $3.50 each, $42;" leaving a balance due October 17, 1903, of $435.04, for which amount the Reinhold Company recovered judgment against the Blakeslee Company. From this judgment, the Blakeslee Company appealed to the circuit court, and thereafter brought suit in the circuit court for the county of Wayne against the Reinhold Company to recover damages for alleged breaches of the agreement by the said Reinhold Manufacturing Company. Upon motion of counsel for the Blakeslee Company, both cases were consolidated and tried together before a jury, resulting in a verdict in favor of the Reinhold Manufacturing Company, defendant and appellee herein, for $448.

On the trial in the circuit court, G. S. Blakeslee, president of plaintiff company, testified, among other things, as follows:

"Reinhold kept me supplied with ice-choppers up to September, 1903. I think we ordered two or three cube cutters after March 24, 1903. I think we got three. The last order we gave Reinhold for ice machines was September 15, 1903. * * *

"I remember coming to Detroit on October 16, 1903, to look over their business with a view to buying it. There was considerable talk and Mr. Reinhold, Jr., figured up what he thought could be done.

"*Q.* We just want the conversation, if you can remember; and if you can't, just say so.

"*A.* I can't remember to give very much of the details, but I remember that, and I remember another thing that struck me very forcibly. They said that they had already themselves sold direct about 100 choppers outside of our contract. I was astonished. I remember that distinctly.

"*Q.* Who was that?

"*A.* Why, the senior made the remark first. * * *

"*Q.* Did the young man say anything in relation to it?

"*A.* He did, he admitted it. * * *

"We renewed the contract two years from November, 1903, but did not push the business as hard as we had been doing because we did not know where we could get the stock. Mr. Reinhold having refused other orders under the contract. We did not pay for the ones we had

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on hand because I considered he owed us instead of us owing him anything.

"*Q.* He owed you for what?

"*A.* Machines that he admitted that he had sold during the first year.

"*Q.* He admitted that he sold those when?

"*A.* When Mr. Trelevan and I were here.

"*Q.* That was on October 16th?

"*A.* Yes.

"*Q.* And he told you at that time that he had sold one hundred?

"*A.* Yes. * * *

"*Q.* He told you, did he, that he sold them during the life of your contract?

"*A.* Yes. * * *

"I don't remember ordering any ice choppers that we contracted to buy and sell, after September 5, 1903, that were not filled. I sold a few Davenport ice choppers after November, 1903. They were different from the Reinholds. I don't think we sold any other ice chopper after we had disposed of the machines we had on hand belonging to Reinhold, November, 1903. We have since sold a Reinhold chopper, but not the Reinhold in this case. We have an ice shaver similar to Reinhold's. I don't swear I am not using part of Mr. Reinhold's machine on the machine I am using. I won't swear that I didn't sell my machine in 1904. I would not swear that I didn't have one of my machines in Tom Schmolly's on Wabash avenue, in Chicago, in April, 1904. I might have such a man's name on our books. I don't remember. * * *

"I don't remember of advertising the Reinhold ice machine in 1904. I may have advertised for my ice shaving machine in 1904. I wanted to keep my name before the public as making ice machines; I must have had a machine, or thought I had, when I advertised. * * *

"We sold 115 ice choppers the first year. Then after we found we could not get any more goods, we sold slowly. I did not take any further orders for these. We took the same steps in regard to pushing the cube cutters as we did with the choppers. We had orders for approximately twenty-eight cube cutters. We kept them in stock in Chicago and filled the orders from there, but we only received about three from the Reinholds. * * * On the cube cutters the difference between the price paid and

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the price that we would have received for them if we had been able to fill the orders would have been $675."

Mr. Reinhold testified on the trial in the circuit court, in his own behalf:

"Blakeslee told me October 16, 1903, that he was not in shape to take care of the territory east of Buffalo and was willing to release that territory and take everything west of Buffalo. * * * There were no goods ordered after September 18, 1903. If they would have paid us what we had coming, we were ready to fill orders. They never disputed the bill for $550.84. I don't think there was any payment after November 12, 1903. The last order we got from Blakeslee was September 17, 1903. * * * I did not get any orders after September, 1903, and if Mr. Blakeslee wished any machines he would have got them if he paid for them. I saw a machine, on May 5, 1904, in Tom Schmolly's place on Wabash avenue, Chicago. It was a No. 1 ice chopper. It was Blakeslee's, and was an imitation of our machine.

"*Q.* Then you did sell 28 that year, that you are willing to admit that you sold?

"*A.* Yes, in fact we allowed you that in justice's court in that case. If you look up your statement, you will find it.

"*Q.* You are willing to allow for these choppers?

"*A.* Yes, for commission on them.

"*Q.* And you are willing to allow the Gem choppers?

"*A.* Yes, I am willing to allow commissions on one-half of them under our arrangement.

"*Q.* The contract doesn't say anything about half of it.

"*A.* There is a letter there that shows that they are entitled to one-half and we could have the other half.

"*Q.* That you sold?

"*A.* Yes.

"*Q.* Where?

"*A.* Around the city here.

"*Q.* Did you sell any of these machines outside?

"*A.* No, I didn't have money enough to go out of town to sell any at that time."

On November 25, 1903, the Blakeslee Company wrote to the Reinhold Company a letter, from which we quote the following:

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"We understand, however, that in express opposition to the terms of the contract you have been selling these goods to parties other than us, and while we are willing to share profits with you on goods sold by you in your own city we must most emphatically object to any sale made by you out of Detroit of which we do not get the full profit. We only recently learned of this and in our last letter asked you for an accounting which we did not get. Unless we get a full statement from you by return mail showing what you have sold we shall consider the contract broken by you from the date of your first sale of a machine after you signed the contract with us and shall take vigorous steps to enforce our right in this regard. We never supposed that there would be any difficulty regarding the settlement of this part of the account or we would have spoken about it before, as to the machines which we knew you had sold at the time. As to any money which you claim we owe you, we desire to say that same is not due you until the machines are sold, and even if it were due, we would be compelled to await your action regarding our claim before sending you a check."

The assignments of error raise the following questions:

(1) That the court erred in not submitting defendant's 7th request to charge to the jury, as follows:

"I charge you that the fact that the Blakeslees had a number of orders for certain machines, known as cube cutters, on hand, namely, 28, which the Reinholds refused to fill, is proof of the establishment of the market to the extent of such machines, and the Blakeslees are entitled to recover their loss upon the number of cube cutters that the Reinholds refused to furnish to fill these orders."

(2) That the court erred in not submitting the appellant's 9th request to charge to the jury, as follows:

"I charge you that you may positively allow the Blakeslee Company their profits on the machines admitted on the stand to have been sold during the contract period. [This was admitted by the Reinholds to have been 28.] The Blakeslees have testified that these machines numbered 100. This number is not admitted by the Reinholds and you are therefore at liberty to draw your own estimate as to the amount actually sold by them, and when

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you have fixed this estimate, you are then to allow the Blakeslees their profit on the machines sold."

(3) That the court erred in charging the jury that the Blakeslees were bound to make payment for machines as delivered, when the contract expressly states that payment was to be made within 30 days after machines had actually been sold.

(4) That the court erred in refusing to give appellant's 2d, 3d, and 5th requests to charge.

(5) That the court erred in overruling the appellant's motion to vacate and set aside the verdict rendered by the jury in favor of the Reinholds for reasons set up in the said motion and supplemental motion of appellant, etc.

1. The principal question, in view of the trial court, for determination, and which we think was properly submitted to the jury, was as to who really broke the contract. It seems apparent from the contract, as well as from the record, that the parties were dealing with reference to three different forms of ice machines. The original contract related to the "Reinhold Ice Chopper," which was to be furnished at the price of $21, and to be paid for within 30 days from date of sale by the consignee.

The addition to the contract referred to, 1st, "Gem Ice Choppers" at a price of "Twelve ($12) dollars, less five (5%) per cent. in thirty (30) days and half freight allowed in Chicago;" 2d, "Cube machines on the following terms for one year. Price to be forty-five ($45) dollars f. o. b. Detroit for the term of six (6) months. After that date the said first party is to receive an additional twenty-five ($25) dollars, if the machine is then found satisfactory."

We are of the opinion that the court correctly construed this addition to the contract as stating its own terms of payment and not adopting with reference thereto the provision of the original contract, which related solely to the "Reinhold Ice Chopper."

The plaintiff company not only failed to show compliance on its part with the terms of the contract as to pay-

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ment for the "Cube cutters," but, on the contrary, proved its refusal to comply with such terms. It follows that the request was properly refused.

2. It appears from the letter of the Blakeslee Company that they were willing to share profits with the defendant "on goods sold by you in your own city," and it further appears from the bill of particulars that they were given credit for one-half the commissions on the machines admitted to have been sold, and the only machines admitted to have been sold, by the defendant. Mr. Reinhold testified that these 28 machines were sold in the city of Detroit. The Blakeslee Company received the benefit of the commission, in accordance with the terms of their letter, in the judgment in justice's court, and apparently received the benefit thereof in the verdict of the jury in the circuit court. The trial judge covered this request in his charge, as follows:

"If you find that the plaintiff, regardless of the terms of the contract, sold either one hundred machines or any number less than one hundred, or whatever number you determine the evidence shows, then you should deduct the amount of the profits that the defendant would have made if it had sold these machines from the claim of the plaintiff, which is $500."

The request as presented required the court to charge the jury, as to the number of machines sold, that "The Blakeslees have testified that these machines numbered 100." The Blakeslees had not so testified, but only to alleged admissions by the Reinholds, and the circuit judge was, therefore, justified in refusing the request as presented.

3. What we have said on the first point renders it unnecessary to discuss this point.

4. The second and third requests to charge required the court to determine as a matter of law that the contract had been broken by the Reinhold Company, which the court very properly refused to do. The fifth request was given in terms.

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5. No reasons were filed by the court for overruling the motion to set aside the verdict, nor exceptions taken, and the matter is not before us for consideration upon this record.

The judgment is affirmed.

GRANT, C. J., and MONTGOMERY, CARPENTER, and MCALVAY, JJ., concurred.

CUDNEY v. SHERRARD.

1. APPEAL AND ERROR — REVIEW — FINDINGS OF FACT — CONCLUSIVENESS.
   Where, in a case tried to the court, no amendments to the findings appear to have been proposed, the court will presume the findings were warranted by the evidence.

2. ADVERSE POSSESSION—EJECTMENT—FINDINGS—SUFFICIENCY TO SUPPORT JUDGMENT.
   In ejectment to recover a strip of land along a boundary, a finding that plaintiff had occupied the land for a sufficient period to acquire title by adverse possession was sufficient to support a judgment in his favor.

3. APPEAL AND ERROR—QUESTIONS CONSIDERED—RECORD.
   The court does not consider questions not raised by the record.

4. EJECTMENT—ADVERSE POSSESSION—EVIDENCE—MATERIALITY.
   Where, in an action of ejectment to recover a strip of land along the boundary between plaintiff and defendant, the undisputed evidence showed an original location of a boundary line fence by adjoining owners and an adverse occupation of the land on each side of the line down to the removal of the fence by defendants, with all the elements of adverse possession, and the only disputed question is how far defendants moved the fence, questions asked of plaintiff's predecessors in title whether they ever had any idea of claiming title to any land beyond the true boundary line were purely academic and properly refused.

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Error to Shiawassee; Miner, J. Submitted April 16, 1908. (Docket No. 96.) Decided June 27, 1908.

Ejectment by L. G. Cudney against William Sherrard and another. There was judgment for plaintiff, and defendants bring error. Affirmed.

Walsh & Pardee (*Rollin H. Person*, of counsel), for appellants.

W. J. Parker (*Watson & Chapman*, of counsel), for appellee.

BLAIR, J. This is an action in ejectment, brought to determine the ownership as between adjoining proprietors of a strip of land described in the declaration as follows, viz.:

"A strip of land commencing at a point 40 rods east of the quarter post on the west side of section 2, in town 7 north, range 3 east, running from thence east on the quarter line 40 rods, thence 25 feet south, thence westerly to a point 42 feet south of the point of beginning, thence north to the place of beginning, and being a part of the northwest quarter of the southwest quarter of said section," etc.

The case was tried by the court without a jury, and, among others, the court made the following findings:

"So in this case back in 1880, the plaintiff owned an eighty acres of land on section 2; immediately west of him Mr. Hoenshell and his son owned an eighty, and at that time the plaintiff was living upon his, but I do not know whether the evidence shows that Mr. Hoenshell was living upon his at that time or not; if he was not living upon this eighty he was living upon a forty which was across the road.

"At that time they desired to build a fence, such a fence as a great many of the early settlers used to, and they started in to build a fence along the north end of those two eighties, and the two men united their forces together, that is, in lieu of each building a fence along his own eighty they united together and built the fence along the northern boundary, and it seems they took some pains to

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ascertain where the correct location was at that time. * * *

"Now whether they got that line correct or did not get it correct I do not think it is necessary to determine in this case. Whether the line they decided upon at that time was correct, or whether the line that Mr. Lyman Mason afterwards decided upon was correct, as I look at this case, it is not necessary to determine that fact. If those people at that time built what they believed to be the boundary line between them, and others from that time entered into possession of the same and occupied it to the exclusion of all others, and cultivated it as such land is usually cultivated, and that their possession was of such a nature and anyone could determine it, or, in other words, that the possession was open, notorious and hostile, that is, they occupied it to the exclusion of others for a sufficient length of time which the statute of our State has fixed at 15 years, as I look at it, that is sufficient to entitle the plaintiff to the title to that land by reason of adverse possession. I don't think there is any dispute upon that question in the case here, that at least a part of this land was occupied by the plaintiff for at least the statutory period of time, 15 years.

"Therefore, I find as a matter of fact that the plaintiff occupied the land for the statutory period, in such a manner and in such a way that it would give him title by adverse possession. Now, the question comes up, how much of it did he occupy; whether it was the amount described in the declaration or was it the amount claimed by the defendant, and that is a much more difficult question to decide, in my opinion, than the first. * * *

"So my opinion is and I so find that the northern boundary of the brush fence as originally built was a continuation of the fence that went north and along the line of Mr. Cudney's eighty. And that the eastern boundary of the line north of this forty was the same as the eastern boundary along north of Mr. Cudney's. And the same would be true as to the western boundary, being the boundary that continued along north of Mr. Hoenshell's west forty. Therefore, I find in this case that the plaintiff is entitled to the land described in his declaration."

No requests for findings of fact or law nor proposals of amendments appear in the original or printed record. Defendants filed the following exceptions, viz.:

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"*First.* Defendants except to the refusal of the circuit judge to find as in their requests for findings respectively and filed herein before judgment.

"*Second.* To the findings of fact adduced from the testimony admitted against defendants' objections, and being immaterial, irrelevant and incompetent.

"*Third.* To the judgment entered as not being supported by the findings of fact."

Defendants have removed the record to this court for review upon writ of error, assigning the following errors, viz.:

"*First.* The said court erred in refusing to find, as requested by defendants in their first request, that the plaintiff nor his predecessors in title never had any idea or intention of holding any of defendants' land in question beyond the true boundary line, but that they all believed the old fence in question was on the true boundary line, and, therefore, plaintiff having no intention of claiming beyond the true boundary line, cannot recover.

"*Second.* The said court erred in refusing to find, as requested by defendants in their second request, that the court should find generally in favor of the defendants and for no cause of action.

"*Third.* The said court erred in sustaining the objection entered by plaintiff's counsel to the following question asked by defendants' counsel of the plaintiff on cross-examination: 'Did you have any purpose or idea after you took possession of this forty acres in question, of claiming title to any land beyond the true boundary line between you and Mr. Sherrard?' * * *

"*Seventh.* The court erred in arriving at the judgment entered for the plaintiff in this cause for the reason that it is not supported by the findings of fact."

The 4th, 5th, and 6th assignments are the same in substance as the 3d.

Counsel for appellants in their brief argue in support of three propositions, as follows:

(1) That the judgment was not authorized by the findings of facts, for the reason that by his declaration plaintiff—

"Made the recovery of the disputed strip to depend up-

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on its being south of the quarter line; and made the judicial establishment of the quarter line a condition precedent to any recovery.

"The court however expressly declined to determine whether the quarter line was where plaintiff claimed, namely, on the line of the old brush fence, or whether it was in accordance with the new survey as claimed by defendants. Hence there was no basis for any recovery in this case."

(2) The court found plaintiff's title to the disputed strip to rest entirely upon adverse possession.

"But the record does not show any privity between the title of plaintiff and the title of the Hoenshells. When plaintiff's grantor Bruff got it, and of whom he got it, we do not know.

"And there is no authority for tacking the title of the Hoenshells to the possession of plaintiff or of Bruff; if the latter ever had possession. And without such tacking there is no continuous possession for the period of fifteen years."

(3) The court erred in excluding the questions asked by defendants' counsel of the several occupants of the land, as to the intention with which they held possession up to the brush fence.

1. As no amendments appear to have been proposed to the findings, we must assume that they were warranted by the evidence. *Becker* v. *Headsten*, 137 Mich. 478.

The court's finding amounted, in substance, to a determination that the plaintiff had occupied the land described in his declaration for a sufficient period to acquire title thereto by adverse possession. Such finding was sufficient to support the judgment.

2. This question is not raised by the record, and we, therefore, do not consider it.

3. The undisputed evidence showed, as found by the court, an original location of this boundary line fence by adjoining owners and an adverse occupation of the land on each side of the line down to the removal of the fence by defendants, with all of the elements of adverse posses-

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sion, the only disputed question being how far south defendants moved the fence. Under such circumstances, the questions propounded were purely academic and were properly refused.

The judgment is affirmed.

GRANT, C. J., and MONTGOMERY, CARPENTER, and MCALVAY, JJ., concurred.

GRAND UNION TEA CO. *v.* LEWITSKY.

1. INJUNCTION — BILL — SUFFICIENCY — VIOLATION OF CONTRACT — ADEQUATE REMEDY AT LAW.

   A bill to restrain the violation of a contract of employment which alleges that defendant is making use of the information gained through his employment with complainant to win away to a competitor complainant's customers, and that he is doing so by making fraudulent misrepresentations of fact, states a case as to which the remedy at law is inadequate.

2. STATUTES — CONSTRUCTION — AMENDATORY STATUTES — LIMITATION TO SCOPE OF ACT AMENDED.

   Act No. 329, Pub. Acts 1905, invalidating contracts in restraint of trade, is an independent act with a title of its own, and is not limited in its operation by its section 7 to such contracts as are within the purview of Act No. 255, Pub. Acts 1899, for the prevention of trusts, monopolies, and combinations, though said section 7 declares Act No. 329 to be supplementary to, declaratory of, and in addition to, said Act No. 255.

3. CONSTITUTIONAL LAW — 14th AMENDMENT — RIGHT TO CONTRACT — RESTRAINT OF TRADE.

   Act No. 329, Pub. Acts 1905, invalidating agreements not to engage in a particular employment, except when ancillary to a sale of a business, does not conflict with the 14th Amendment of the Federal Constitution, by prohibiting the making of reasonable contracts for the protection of one's business.

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4. CONTRACTS — EMPLOYMENT — RESTRAINT OF TRADE — ENFORCEABILITY.

A contract of employment by which the employé agrees not to engage in business in the employer's line for one year after leaving the employment is invalid as contrary to the express terms of Act No. 329, Pub. Acts 1905.

Appeal from Wayne; Mandell, J. Submitted April 16, 1908. (Docket No. 79.) Decided June 27, 1908.

Bill by the Grand Union Tea Company against Ignaoy Lewitsky to restrain the violation of a contract of employment. From an order sustaining a demurrer to the bill, complainant appeals. Affirmed.

W. W. Wicker (*John C. Donnelly*, of counsel), for complainant.

Frank C. Golden and *Choate & Webster*, for defendant.

BLAIR, J. On the 11th day of February, 1907, the parties to this suit entered into the following agreement in writing:

"Whereas, second party is desirous of securing employment with first party in the business of soliciting orders for and delivering teas, coffees, spices, baking powder, light groceries, etc., and such other goods as are now or may be hereafter handled by first party at its store at No. 140 Michigan avenue, Detroit, Mich., the territory to be solicited and operated by second party to be in the city of Detroit, Mich., and such other place or places as may be mutually agreed upon.

"Therefore it is agreed that first party shall pay second party a commission of 20 per cent. upon all goods delivered by him as, for and in lieu of salary; that second party will devote his entire time and attention to said business and, to the best of his ability, work for the benefit of first party.

"Said second party agrees that he will not leave the employ of first party without giving first party two weeks' notice in writing of his intention so to leave, and further agrees in consideration of the employment and

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payment of commission herein provided that, should he leave the employ of first party, he will not engage in the business of soliciting orders for or delivering any teas, coffees, spices, baking powder, light groceries, etc., in said city of Detroit, Mich., or such other places as he may operate in under this agreement for a period of one year from and after the date of his so leaving said employment.

"Said second party further agrees that should he at any time leave the employ of first party or be discharged from such employ, he will, upon such leaving or discharge, turn over and deliver to said first party, at its store in Detroit, Mich., all goods, wares and merchandise and property of every name, kind and description in his possession pertaining to said business."

Defendant having left complainant's service and entered the employ of a rival company, complainant filed its bill of complaint, containing, among other allegations, the following:

"*Third.* Your orator further represents that its business is, to a large extent, conducted and carried on through its agents and representatives canvassing from house to house, in the city of Detroit, soliciting orders for such teas, coffees, spices, baking powder, light groceries, etc., and thereafter such agent delivering the goods to the respective customers so ordering; that there are a large number of your orator's customers in said city of Detroit, who are called upon by said agents periodically, to secure their orders and deliver the goods so ordered, and that each of said agents has a particular route or territory which he canvasses, and the trade of which he handles for your orator; that in the conduct of said business, each of said agents has a route which requires said agent to call upon the customers upon said route on particular days of each week, and that it requires one week for each of said agents to cover said route; that the names and addresses of the customers, together with the day of the week they should be called upon, are kept upon cards, each card containing the information for one customer, and upon which is placed the kind and quantity of goods ordered by each customer respectively; that in the establishment of such routes, your orator expended large sums of money in securing customers, and in securing the

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necessary information placed upon such cards, and that such information is for the purpose of retaining the trade and good will of its customers, and that the same is a trade secret necessary to enable it to carry on its business, and that the cards, together with the information thereon, for each of said routes, is of great value, to wit: of the value of $500 and upwards.

"*Fourth.* Your orator further shows that the defendant herein, Ignaoy Lewitsky, entered the employ of your orator on or about the 11th day of February, 1907, under and pursuant to the terms of a written agreement, a copy of which is hereto attached, marked Exhibit A, reference to which is hereby prayed for greater certainty, and the same made a part hereof; that said defendant continued in the employ of your orator, soliciting orders upon a route or territory, and delivering the goods so ordered, in said city of Detroit, and continued so to do until the 1st day of October, 1907, at which time he voluntarily left the employ of your orator, and has not since been in its employ; that the business of said route aggregated approximately $85 per week; that at the time of the making of said contract, said defendant, Ignaoy Lewitsky, was, as your orator is informed and believes, and upon such information and belief charges the fact to be, unfamiliar with, and ignorant of such business, and that your orator from the said 11th day of February, 1907, until the 16th day of March, 1907, paid said Lewitsky a salary, in lieu of the commission provided for in said contract, and in addition thereto, your orator caused other of its agents, to whom your orator paid salaries, to canvass upon said prospective route, and secure customers and orders, and the expense thereof was paid by your orator; that your orator, in building up said route, and securing customers thereon, expended a large sum of money, to wit: The sum of $225 and upwards, and that all the information acquired by such other employés of your orator, were placed upon said cards of said route, and were turned over to said Lewitsky for his use as your orator's agent, in conducting the business on said route.

"*Fifth.* Your orator further shows that there are in said city of Detroit, other business houses, handling and selling the same character of goods and merchandise as are handled and sold by your orator, and who conduct their business in the same general manner as is conducted by your orator, by the canvassing and soliciting of orders from house to house.

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"*Sixth.* Your orator further shows that on the 1st day of October, 1907, said defendant then being in the employ of your orator as aforesaid, left its employ, and thereafter and on the 4th day of November, A. D. 1907, in violation of the terms of his said agreement, Exhibit A, hereto attached, entered the employ of the Great Atlantic & Pacific Tea Company, a company engaged in the selling of the same character of goods and merchandise as are sold by your orator, and which conducts its business in the same general manner as your orator, as aforesaid, and on said 4th day of November, 1907, in violation of the terms of his said agreement, commenced canvassing and soliciting orders for teas, coffees, spices, baking powder, light groceries, etc., for said Great Atlantic & Pacific Tea Company, and since said 4th day of November has been, and now is, engaged in so canvassing and soliciting orders for such goods, wares and merchandise, and delivering the same to the customers, and endeavoring to induce the customers of your orator to discontinue buying goods from it, misrepresenting the facts in the matter, and stating, among other things, to such customers that the agent of your orator, who has since said defendant left your orator's employ canvassed and solicited orders upon the route and in the territory and from the customers theretofore called upon by said defendant, would not call upon them any more, but that he, said defendant, would call upon them and take their orders and deliver them goods, and has so represented to a large number of the customers of your orator in said city of Detroit; that said defendant, by reason of his employment as such salesman and canvasser, was by your orator entrusted with, and has become possessed of the facts shown by said cards, and the information relative to the names and addresses and wants of the customers upon said route, and the day that each of said customers should be called upon, and that said defendant has learned or copied the lists of said customers on said route and the other data and information connected with said trade, and is now in possession of such information and is using the same to the prejudice of your orator's rights and in the interest of said competitor of your orator.

"*Seventh.* Your orator further avers that by reason of the action of said defendant, and that if he be permitted to continue in such canvassing and soliciting of orders upon said route, or in the city of Detroit, and from said

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customers of your orator in the interest of said competitor, or any competitor of your orator, a great and irreparable injury will be done to your orator, and that it will be damaged to the extent of five hundred ($500) dollars and upwards in the loss of profits and business to which it is lawfully entitled, and that said defendant is now seeking to divert and take away from your orator to the competitor aforesaid of your orator.

"*Eighth.* Your orator further shows that it is informed and believes, and upon such information and belief charges the fact to be, that said defendant intends to divulge the trade secrets aforesaid of your orator and the names and addresses of its customers on said route, together with the other knowledge and information acquired by him while in the employ of your orator as aforesaid.

"*Ninth.* Your orator further avers that said defendant is financially irresponsible and unable to answer in damages, and that your orator is without remedy in a court of law and is without remedy except in a court of equity.

"Wherefore your orator prays: * * *

"*b.* That said defendant, Ignaoy Lewitsky, may, by the order of this court, be restrained from canvassing or soliciting orders for or delivering teas, coffees, spices, baking powder, light groceries, etc., in said city of Detroit, Wayne county, Michigan, and from soliciting orders or delivering goods to any of the customers of your orator in said city of Detroit, and that he be also restrained from in any manner revealing, showing or communicating the names or addresses of said customers of your orator upon said route, or any of them, or of any of its route or routes, to any person, firm, copartnership or corporation, or from divulging or communicating to any person or persons his knowledge of the dates upon which each of said customers should be called upon."

To this bill of complaint defendant demurred, for the following reasons:

"1. Because complainant has a full, complete and adequate remedy at law.

"2. Because the contract between complainant and defendant attached to the amended bill of complaint is against public policy, void and illegal.

"3. Because the contract which is the basis of the suit is void, illegal and against public policy.

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"4. Because the injunction asked for would be illegal and void.

"5. Because there are not sufficient allegations in the bill outside of the contract that have no reference to the contract to entitle complainant to an injunction.

"6. Because, in the absence of a written contract, complainant is not entitled to an injunction against defendant.

"7. Because the only contract between complainant and defendant is void. It is just the same as though there was no contract between complainant and defendant, and in the absence of a written contract complainant cannot restrain defendant from soliciting old customers."

The demurrer was sustained by the court and a decree entered dismissing the bill of complaint. From such decree, complainant appeals to this court.

The questions presented by the briefs for our determination are:

(1) Has complainant an adequate remedy at law?

(2) Does the contract fall within the provisions of Act No. 329 of the Public Acts of 1905, entitled:

"An act relative to agreements, contracts and combinations in restraint of trade or commerce."

(3) Is said act constitutional?

1. Counsel for defendant, in support of their demurrer as to this point, argue that as the contract in question is not a contract of sale, nor incidental or ancillary to nor in support of a contract of sale, but a mere contract of employment, requiring no special training, knowledge, skill or experience for its performance, the case is ruled by *Osius* v. *Hinchman*, 150 Mich. 603. A reading of the case cited in comparison with the bill of complaint in this case is sufficient to show the essential dissimilarity of the two cases. The bill of complaint in the present case not only alleges that the defendant is making use of the information gained through his employment to win away to a competitor complainant's customers, but is doing so by making fraudulent misrepresentations of fact. Under such a showing it cannot be said that the complainant has

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an adequate remedy at law. *Davies* v. *Racer*, 72 Hun (N. Y.), 43.

2. Section 1 of Act No. 329 of the Public Acts of 1905 provides that:

"All agreements and contracts by which any person, copartnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void."

It is clear that the contract in question comes within the letter of the section and is governed by its terms, unless the provisions of section 7 limit the operation of the act to such contracts as are within the purview of Act No. 255 of the Public Acts of 1899 (aimed at the prevention of trusts, monopolies and combinations), as claimed by complainant. We do not think the act of 1905 is to be so construed. Section 7 reads as follows:

"This act is declared to be supplementary to, and declaratory of, and in addition to, Act No. 255 of the Public Acts of 1899, page 409."

The act is not a merely amendatory act limited to the object embraced within the title of the original act, but is an independent act with a title of its own. Whatever effect the act of 1905 may have upon the construction of the act of 1899, we would not be warranted in wresting the language of section 1 from its obvious meaning to make it conform to the title of the act of 1899, provided its provisions are reasonably within its own title, as we think they are.

3. Complainant's counsel contend that the statute violates the 14th Amendment to the Constitution of the United States, "in that it attempts to prohibit making of reasonable contracts" for the protection of one's business.

Section 1 of the act must be read in connection with section 6, which provides:

"This act shall not apply to any contract mentioned in

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this act nor in restraint of trade, where the only object of the restraint imposed by the contract is to protect the vendee or transferee of a trade, pursuit, avocation, profession or business, or the good will thereof, sold and transferred for a valuable consideration in good faith and without any intent to create, build up, establish or maintain a monopoly."

Construed together, the two sections provide, in substance, that all agreements not to engage in any avocation, employment, pursuit, trade, profession, or business, except where the only object of the restraint is to protect the vendee or transferee of a trade, pursuit, avocation, profession or business or the good will thereof sold and transferred for a valuable consideration in good faith, shall be void as against public policy.

It will be observed that this statute exempts from its condemnation contracts incident or ancillary to the sale of a business, trade, or profession, which have frequently been sustained by this court. Similar statutes exist in other States, which appear to have been treated as valid exercises of legislative power by their courts. See *Prescott* v. *Bidwell*, 18 S. Dak. 64; *Merchants' Ad.-Sign Co.* v. *Sterling*, 124 Cal. 429 (46 L. R. A. 142); *Hulen* v. *Earel*, 13 Okla. 246; *Dodge Stationery Co.* v. *Dodge*, 145 Cal. 380.

The usual ground upon which contracts in restraint of trade are held to be invalid is that they are contrary to public policy.

"Public policy in the administration of the law by the court is essentially different from what may be public policy in the view of the legislature. With the legislature it may be, and often is, nothing more than expediency. The public policy which dictates the enactment of a law is determined by the wisdom of the legislature." *Enders* v. *Enders*, 164 Pa. 266 (27 L. R. A. 56).

Originally, at the common law all contracts in restraint of trade were held to be invalid as against public policy. But considerations of public policy vary with the times and the progress of civilization, and contracts in restraint

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of trade have been very much limited by decisions of the courts and by statutes, and—

"A doctrine has been introduced in some of the later cases, both English and American, which may be called the doctrine of the reasonableness of the restraint." 9 Cyc. p. 529.

The history of the doctrine indicates that it has been, from the beginning, a proper subject for legislative consideration, and only in case of a clear violation of constitutional rights ought the courts to interfere with legislative discretion.

Limited as the statute is, we do not think it can be held to invade any constitutional right of the complainant under the 14th Amendment of the Federal Constitution. The contract must, therefore, be held to be invalid, and the decree is affirmed, with costs to defendant.

GRANT, C. J., and MONTGOMERY, CARPENTER, and MCALVAY, JJ., concurred.

LONIER v. ANN ARBOR SAVINGS BANK.[1]

TRIAL — MOTION FOR DIRECTED VERDICT — QUESTION OF FACT — SUBMISSION TO JURY.

Where the testimony of the principal witness, on direct examination, supported plaintiffs' theory that defendant bank discounted a note belonging to plaintiffs on an unauthorized indorsement of plaintiffs' agent, who absconded, and on cross-examination gave inconsistent testimony tending to support defendant's theory that it loaned money to witness, who paid it to the agent, there was a question for the jury as to which portion of the witness' testimony they would believe, which should have been submitted to them, notwithstanding a motion by both parties for a directed verdict.

[1] Rehearing denied September 10, 1908.

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Error to Washtenaw; Kinne, J. Submitted May 4, 1908. (Docket No. 88.) Decided June 27, 1908.

Trover by Louis Lonier and William J. Hoffer, copartners as Lonier & Hoffer, against the Ann Arbor Savings Bank. There was judgment for defendant on a verdict directed by the court, and plaintiffs bring error. Reversed.

A. F. & F. M. Freeman, for appellants.

B. M. Thompson and *Arthur Brown*, for appellee.

MOORE, J. This suit was commenced by declaration containing a special count for moneys had and received and a count in trover for conversion of a note. The defendant pleaded the general issue. At the close of the testimony, the attorneys of each of the parties contended the judge should direct a verdict one way or the other. The trial judge directed a verdict in favor of defendant, and plaintiffs appeal, and assign error upon the direction of a verdict for defendant and the refusal of the court to direct a verdict for plaintiffs.

Plaintiffs are millers at Manchester, and defendant is a banking corporation at Ann Arbor. Mr. Heusel is a baker at Ann Arbor and was a customer of plaintiffs, who had in their employ as a traveling salesman one Donaldson, whose duty was to sell their goods. He was authorized by plaintiffs to settle accounts and receipt therefor. It is claimed by plaintiffs he had no authority to indorse, negotiate, or discount commercial paper given on settlement of an account with a customer of plaintiffs, but was directed to send such commercial paper home to plaintiffs, and, when cash was paid to him in settlement of an account, he was instructed to go to a bank, buy a draft, and mail the same to plaintiffs. It is claimed by plaintiffs that on April 4, 1906, Mr. Heusel was indebted to them in the sum of $367.29 for flour, and that on that date he settled this account, through Donaldson, by giving his

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note, payable to the order of Lonier & Hoffer, for the above amount, and Donaldson receipted the bill by marking it "Paid," and took the note and discounted it and embezzled the funds. On the part of defendant, it is claimed that, instead of discounting the note for Mr. Donaldson, they loaned the money to Mr. Heusel, and that, if Mr. Donaldson did anything wrong in indorsing the note, it is a matter between the plaintiffs and Mr. Heusel. The testimony of the plaintiffs was to the effect that, while Mr. Donaldson was authorized to make collections and to receipt therefor, he was not authorized to indorse and discount notes given him in settlement of accounts.

Mr. Heusel was a witness. The material parts of his testimony are as follows:

"I knew one Donaldson, who was a traveling salesman or drummer for plaintiffs. About April 4, 1906, I was owing Lonier & Hoffer for some flour they had shipped from Manchester to me. I was owing them $367.29. I paid that account by giving my note. * * * I signed the note and delivered it to Mr. Donaldson, and when I delivered the note to him he receipted my bill. He marked my bill 'Paid,' and I considered that had closed the account. At the time that I delivered the note to Donaldson, he receipted the bill of Lonier & Hoffer, that this note was given for, and he took this note and went away. The note was made out at the Ann Arbor Savings Bank. I was down with him at that time. I never saw the note again, until I paid it. * * * You [Mr. Freeman] had been to see me, and had a talk with me about Donaldson, but I don't remember whether or not you told me not to pay that note to anybody except Lonier & Hoffer. * * * You told me that Donaldson had absconded. I heard that before you told me. When I paid the note, it was down at the bank, as much as I know. I cannot remember the date that I paid it. I cannot state whether or not Mr. Hoffer was over to see me about the time that I paid the note. I had been buying goods from Lonier & Hoffer for a number of years. Mr. Donaldson sold me the goods."

Cross-examination:

"Q. Had you ever paid this man before?

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"*A.* I did. * * *

"*Q.* How many times?

"*A.* That I don't know. I simply bought flour whenever I needed it, and paid for it whenever I had the money. I had been doing that for a number of years, five or six years at least. While I was with my brother we bought flour from this same man and paid him right along.

"*Q.* Did you ever pay anybody else for flour received from this agent up to that time?

"*A.* Since I have been alone I always settled with Donaldson, when he was here; but, when I was with my brother, he always attended to that. Since I have been alone, I have always attended to it.

"*Q.* Did you ever settle any accounts with the plaintiffs or either of them during the time Donaldson worked for them?

"*A.* I always settled with Donaldson.

"*Q.* How did you settle with him? Give him money?

"*A.* I gave him a note once or twice, and the last time I gave him checks.

"*Q.* And he took them to the bank and got the money, did he?

"*A.* That is the only time, I guess, those two last notes. * * *

"*Q.* Can you remember the execution of a note of January 4, 1906, to Lonier & Hoffer for $590?

"*A.* I think so. I think it was due in four months. I was down to the bank with him. I think Mr. Fritz made out the note, and I signed the note, and he signed the note and got the money.

"*Q.* Then a few months after that, on April 4, 1906, or three months, April 4th, Mr. Donaldson came again, didn't he, and at that time you went to the bank, and you gave a small note to take up a portion of the $590 note, and a new note for $367.29?

"*A.* Yes.

"*Q.* You signed the notes?

"*A.* Yes.

"*Q.* And Mr. Donaldson signed the notes?

"*A.* Yes.

"*Q.* And the money was laid over there on the table or desk right where Mr. Fritz sits, and he took the money and went away, did he not? That $367.29?

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"*A.* Of course, I have not seen that he took the money. At least I cannot remember it. I did not get it.

"*Q.* So that if Mr. Fritz paid any money there, or anybody got any money, Donaldson got it?

"*A.* Donaldson got it; yes, sir.

"*Q.* On that date you gave two notes, you paid $400 in cash on the $590 note that reduced it to $190?

"*A.* Yes, and I gave a new note for that.

"*Q.* And you also borrowed enough money from Mr. Fritz to pay up this $367.29?

"*A.* Yes, sir. * * *

"*Q.* I show you paper marked 'Exhibit D 1,' and ask you whether that is the discount slip that Mr. Fritz made out at the time you obtained that loan?

"*A.* Yes. (Exhibit D 1 is as follows: 'Discount by Ann Arbor Savings Bank 4—4—1906. For Sam Heusel, 6 per cent., $367.29, 6 per cent., $190.')

"*Q.* When this note for $367.29 came due, you paid it, did you, or about that time?

"*A.* Yes, in the course of business I paid it to the Ann Arbor Savings Bank."

Redirect examination:

"*Q.* In answer to Mr. Brown, you said that upon April 4th you borrowed some money of the Ann Arbor Savings Bank. You did not give any note that day running to the bank, did you?

"*A.* That I cannot remember.

"*Q.* You gave a note, just as you testified a little while ago, that was payable to the order of Lonier & Hoffer?

"*A.* Yes, sir.

"*Q.* And Donaldson wrote on the back of that note Lonier & Hoffer's name, didn't he?

"*A.* Yes.

"*Q.* And he took the note and gave it to the cashier of the bank, didn't he?

"*A.* I don't know whether he did or not.

"*Q.* You did not see him do that?

"*A.* I wasn't down there at that time.

"*Q.* The last you saw of the note was when you gave it to Mr. Donaldson?

"*A.* Yes, sir.

"*Q.* There is something about a $190 note that was given. Had you given a note to Mr. Donaldson before April 4th in settlement of accounts?

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"*A.* I guess I did, if I can remember. I don't think I ever told you about that before. It was for $590. That note was paid. When it became due it was returned to me. It was not returned to me before I paid it. When I paid it, it was done at the bank. I went to the bank and paid $400 in cash and gave a new note to the bank for $190.

"*Q.* And you also upon that same date gave a note for $367.29, to Lonier & Hoffer, payable to Lonier & Hoffer, didn't you?

"*A.* Yes.

"*Q.* And the last you saw of that note, which I show you, was when you handed it to Mr. Donaldson?

"*A.* Yes."

Recross examination:

"I went with Mr. Donaldson to the bank on April 4th, and when I went there I had a note there of $590 and wanted to make arrangements to take care of that $590 note, and also pay Mr. Donaldson for a bill that was then coming due.

"*Q.* For $367.29, so you paid Mr. Fritz $400 upon the $590 note and gave him back another note for $190?

"*A.* Yes.

"*Q.* And Mr. Donaldson indorsed that, did he not?

"*A.* Yes.

"*Q.* Signed Lonier & Hoffer's name on the back of it?

"*A.* Yes, sir.

"*Q.* Then you also gave Mr. Donaldson another note for $367.29, payable to the order of Lonier & Hoffer?

"*A.* Yes.

"*Q.* And Mr. Donaldson signed that?

"*A.* Yes.

"*Q.* And Mr. Fritz laid the money out there on the desk, and either you or Donaldson took the money?

"*A.* He must have taken it. I didn't get it.

"*Q.* So you paid the $590 note with $400 in cash and a new note, and also paid this bill by getting another loan from the bank for $367.29?

"*A.* Yes, sir.

"*Q.* And Mr. Donaldson went away with the money, didn't he?

"*A.* He must.

"*Mr. Freeman:* We move to strike out the testimony of any other note as incompetent and immaterial. (Objection overruled. Exception for plaintiffs.)"

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Redirect examination:

"Yes, back in January I gave a note to Mr. Donaldson for $590. That note ran to Lonier & Hoffer. The next I knew of it, it was over at the Ann Arbor Savings Bank. Upon April 4th, I went to the Ann Arbor Savings Bank with $400 in cash. The bank was claiming to own that note at that time, and I went to the bank with $400 in cash and paid that note to the bank with the $400 in cash and another note. It seems to me that the note must have been given to Lonier & Hoffer. Yes, the bank claimed to own that $590 note. They had it. I was paying a note the bank had against me. I paid that. I owed Lonier & Hoffer only $367.29.

"*Q.* You paid that by giving this note of $367.29 to Lonier & Hoffer? Is that right?

"*A.* I think so.

"*Q.* Now, the bank had a note against you for $590 that you had given to Lonier & Hoffer, but the bank was then claiming to own it, is that true?

"*A.* I don't see. Of course, I understand what you mean, I can't recollect; but it seems to me that $190 note was made out to Lonier & Hoffer. Of course, I don't know.

"*Q.* You paid $400 on the note?

"*A.* I understand.

"*Q.* You paid $400 in cash that you had to the bank?

"*A.* Yes.

"*Q.* That left you owing $190 to the bank upon that note?

"*A.* Yes.

"*Q.* What reason would there be for giving a note to Lonier & Hoffer?

"*A.* I couldn't tell you. It has been so long ago.

"*Q.* Then you are not able to say whether the $190 note ran to Lonier & Hoffer or to the bank?

"*A.* I don't believe I can."

Recross examination:

"On January 4th when I gave this $590 note I was indebted to Lonier & Hoffer for $590 worth of flour, and went to the bank with Mr. Donaldson.

"*Q.* You went with Mr. Donaldson, the agent of Lonier & Hoffer, who pretended to be their agent, at least, down to the bank, and asked Mr. Fritz for a loan of $590, didn't

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you, to pay that, and you got it on your note there that day?

"*A.* Yes.

"*Q.* And Mr. Donaldson took that $590 and put some more money with it and bought a draft and sent it to Lonier & Hoffer?

"*A.* I think so. When that $590 came due I owed it at the bank and had $400 in my bank that I could spare. I paid $400 on that note and gave a $190 note for the balance.

"*Q.* And gave a new note for $367.29, and turned it over to the other fellow; is that true?

"*A.* Yes."

Redirect examination:

"This note of $367.29 was given for flour; it was not a renewal of any old note or anything of that kind; that was for a bill of flour, and when I gave the note Donaldson marked bills 'paid.'"

It will be observed that the testimony of this witness drawn out upon the cross-examination is inconsistent with that given on his direct examination. His testimony on the direct examination tends to support the theory of plaintiffs. His testimony on the cross-examination as well as the discount slip tends to support the theory of defendants. The cashier of the bank was not a witness.

Under these circumstances, notwithstanding the request of counsel that the judge should direct a verdict one way or the other, we think he ought not to have done so, but should have permitted the jury to say which portion of Mr. Heusel's testimony they believed.

Judgment is reversed, and new trial ordered.

OSTRANDER, HOOKER, CARPENTER, and MCALVAY, JJ., concurred.

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MOORE v. BULGREEN.

1. EASEMENTS—RIGHT OF WAY—ESTABLISHMENT—PRESCRIPTION.
Defendant does not show a prescriptive right to cross complainant's land to reach his own, by showing that from 1888 to 1906 he has, at intervals, crossed one or other or both of complainant's parcels, and that as late as 1892 he sought, without success, to bargain for a way, and that such use as he made of the land in crossing it was at that time permissive; that since that time the way has been repeatedly obstructed, which obstructions he has removed.

2. ADVERSE POSSESSION—TRESPASS—ACQUISITION OF RIGHT.
Whether repeated trespasses accompanied by violence and by destruction of property will ever grow into a right as by adverse possession, they cannot do so in less time than is required to gain a right by open, notorious, hostile, and peaceable possession, or use.

3. EASEMENTS—RIGHT OF WAY—PRESCRIPTION—TACKING USES.
Assuming that a way originally by permission may in some cases become one of right by hostile use, the period when it was used by permission cannot be tacked on to the period of hostility for the purpose of making the statute period.

4. SAME—BILL TO RESTRAIN TRESPASS—EFFECT OF ALLEGATIONS.
An allegation in a bill to restrain the use of a claimed right of way that defendant "has not now, and never had any right of way, * * * either by prescription, license, or easement," does not require the court to assume that from the beginning defendant's use of the land was adverse.

Appeal from Sanilac; Beach, J. Submitted May 4, 1908. (Docket No. 48.) Decided June 27, 1908.

Bill by Elizabeth Moore against Albert Bulgreen to restrain a trespass upon lands. Defendant filed an answer in the nature of a cross-bill to quiet title. From a decree for complainant, defendant appeals. Affirmed.

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Babcock Brothers, for complainant.

William H. Aitkin (*Charles F. Gates*, of counsel), for defendant.

OSTRANDER, J. Complainant owns the southwest quarter of southeast quarter of section 29, and the northwest quarter of northeast quarter of section 32, in town 12 north, of range 13 east. She filed her bill in May, 1906, asking for a decree restraining defendant from going upon and crossing over said lands, from tearing down and removing her fences and gates. In his answer defendant claims to own a strip from the southeast quarter of the southeast quarter of section 29 to the east 25 acres of the south half of southwest quarter of the same section, which he also owns, and he describes the strip as—

"Land two rods in width and the center line thereof commences about one rod north of the southeast corner of the southwest quarter of the southeast quarter of section 29, and goes in a southwestern direction until it gets one rod south of the section line between sections 29 and 32 in said township, then along the north side of said section 32 and within one rod of such section line until it reaches within one rod of the quarter line running north and south across said section 32, when it goes north for about seven rods to a gate maintained by this defendant for more than fifteen years."

He avers that he—

"Claims such rights by adverse possession for more than fifteen years, and that such way is clearly defined and has been in such use for more than fifteen years and no proceedings were instituted by said complainant or her grantors in law or equity within said fifteen years to deprive this defendant of said way and during all of which time the said defendant admits that he has used the same to drive his teams, vehicles, farm machinery and stock across said lands at his will and pleasure which was well known by said complainant and her grantors during said fifteen years and upwards," and also that it is a way of necessity without which "he cannot reach said twenty-five acres, which he is using under an order of the court

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in a suit now pending and which cannot be reached any other way, or to go from said twenty-five acres to either the southeast quarter of the southeast quarter of section 29 or the northwest quarter of the northwest quarter of section 33 in said township."

Defendant also owns the north half of the southeast quarter of section 29, so that his land bounds complainant's north 40 acres on the east, north, and west sides. He asks for affirmative relief and for a decree declaring him to be owner of the strip of land in fee simple. In the court below it was found that defendant had no right, title, or interest in or to the land for a right of way or otherwise, and no right to cross or recross any part thereof. It is not now claimed that there is a way of necessity. If the claim should be made it could not be supported. We do not understand the theory according to which defendant can claim to own any part of the land in fee. The title deeds show that complainant owns the fee, and the testimony offered by defendant tends at most to establish an easement. It appears that defendant acquired the 25 acres of land at the western terminus of his claimed right of way in 1888, that he cleared it and later raised crops upon it, and that he has at intervals from that time to 1906 reached the land by crossing one or other or both of the complainant's parcels hereinbefore described. There is a swamp or beaver dam meadow in the southwest and west portion of the southwest quarter of the southeast quarter of section 29, extending onto adjoining property, through which a drain has now been cut. It appears to have been understood that at some time a road would be built on the section line between 29 and 32, and the highway commissioner did lay out a highway along the line. The township board, in March, 1892, reversed the action of the commissioner. Defendant contends that his way has been along a portion of the strip which would have been included in the highway if it had been laid out, and from that strip at each end thereof he has diverged to the north upon complainant's land to convenient gaps or gates in

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the east and west line fences. Before the land was all cleared, defendant went over it in various ways at his convenience. At the west he sometimes, as the water permitted, crossed the swamp in one place, sometimes in another, and sometimes passed to the north of it. We need not set out the testimony at large and we are not required, complainant's title to the land having been established, to look beyond the testimony produced by defendant, for the purpose of affirming the decree of the court below. The effect of this testimony is that as late as 1892, he sought, without success, to bargain with the owner and occupant for a way across the southwest quarter of the southeast quarter or a portion of it, and that such use as he made of the land in crossing it was at that time permissive. Since that time and before the bill in this cause was filed, the way has been repeatedly obstructed, complainant has sued defendant in justice's court for trespassing, securing a judgment from which defendant has attempted to appeal to the circuit court. Defendant in his answer asserts that "he has removed all obstructions placed upon said way by complainant or anyone else and still claims the right so to do." It is true that Tank, from whom permission to cross the land on section 29 was had, did not own the land on section 32. As defendant cannot arrive at that portion of the alleged way from, and cannot leave it by passing to, his own land, it is perhaps not material to discuss or determine whether as to the alleged passageway on section 32 the testimony makes a different case. The way asserted is a single and, by description, a continuous one. Assuming it to be material, it is undisputed that since 1892, when complainant's remote grantor became owner of both of the 40-acre parcels first herein described, defendant has had neither continuing permission to cross nor peaceable enjoyment of the alleged way or of any way across the land. He has crossed the land many times in opposition to the known wishes and the express commands of the owner and his tenant. He has torn down wire fencing

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erected by the owner, has rebuilt a gate in the fence, and when the fence was built across the gate he tore that down. To avoid obstructions to his use of the land, he has entered it at various places other than at the gate in the east fence—a gate originally placed there by the owner of the land for his own convenience and first used by defendant by acquiescence of the owner. Whether repeated trespasses accompanied by violence and by destruction of property will ever grow into a right as by adverse possession is a question not involved here. It is clear that it cannot do so in less time than is required to gain a right by open, notorious, hostile, and peaceable possession, or use. And assuming that a way originally by permission may in some cases become one of right by hostile use, the period when it was used by permission cannot be tacked on to the period of hostility for the purpose of making the statute period.

At the hearing, counsel strongly pressed the point that because, in the bill of complaint, it is charged that defendant "has not now, and never had any right of way across said lands of your oratrix, either by prescription, license, or easement, and that he has no right of way across said land, for any of the reasons or excuses given or claimed by him, or for any reason whatever," the court should assume that from the beginning defendant's use of the land was adverse. We think the allegation may not be read in a way which will support the argument. What is charged is that defendant has not and never had a right of way.

The decree of the circuit court is affirmed, with costs.

HOOKER, MOORE, CARPENTER, and MCALVAY, JJ., concurred.

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FERRY *v.* AMERICAN SUCTION GAS PRODUCER CO.

1. MASTER AND SERVANT — PERSONAL INJURIES — NEGLIGENCE OF MASTER—FAILURE TO WARN.

   Whether a non-delegable duty rested upon the master to provide a method of warning its servants of the approach of an electric crane will not be decided in a case in which it appears that, notwithstanding the absence of formally promulgated rules, the servant in charge of the crane understood that he was to "use all care possible" and to keep watch and call out and warn anyone who might be in the way, and that the accident to plaintiff happened because the operator of the crane was talking with another employé and plaintiff's location in the path of the crane "slipped his mind."[1]

2. SAME — FELLOW-SERVANT — INCOMPETENCY — EVIDENCE — SUFFICIENCY.

   In an action by a servant for injuries resulting from being run down by an electric traveling crane, in charge of an alleged incompetent servant, evidence examined, and *held*, insufficient to raise the inference of the operator's incompetence, especially in view of the fact that the disaster resulted, not from the operator's unskillfulness, but from a lapse of memory not inconsistent with skill and competency.

3. SAME — FELLOW-SERVANTS — VICE-PRINCIPALS — NEGLIGENCE — DELEGABLE DUTIES—LIABILITY OF MASTER.

   A master is not liable for injuries to a servant resulting from the negligence of his foreman or superintendent in performing a delegable duty.

Error to Ingham; Wisner, J., presiding. Submitted May 5, 1908. (Docket No. 71.) Decided June 27, 1908.

Case by Eddie M. Ferry against the American Suction Gas Producer Company for personal injuries. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

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[1] As to duty to warn or instruct servant, see note to *James* v. *Rapides Lumber Co.* (La.), 44 L. R. A. 33.

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Black, Reasoner & Hayden, for appellant.

Clarence D. Clark (*Arthur J. Tuttle*, of counsel), for appellee.

Defendant is engaged in the manufacturing business in the city of Lansing. In its shop, which was about 100 feet long and 45 feet wide, was an electric traveling crane used for the purpose of lifting and moving heavy articles from one part of the shop to another. It moved on girders about 12 or 15 feet above the floor. Its mechanism seems to have been comparatively simple. Its movement backward and forward was controlled by a lever which was situated in a cage suspended from one end of the crane. In this same cage were also two other levers and a band brake. One of these levers controlled the movements of a car which constituted part of the crane and moved back and forth across it. The other lever controlled a drum upon a car, which, by means of a chain attached thereto, raised and lowered objects moved by the crane.

Plaintiff was a mechanic in the employ of defendant. A Mr. Hillprecht was superintendent of defendant's manufactory in which were employed about 13 men. He directed plaintiff to do some mechanical work in proximity to the track upon which the crane moved. To do this work, plaintiff placed himself, and had to place himself, immediately in the path of the crane. While he was thus at work, one Court Wollpert, another employé of defendant, moved the crane against plaintiff and injured him. This suit was brought to recover damages. It was tried in the circuit court before a jury and a verdict directed in defendant's favor. Plaintiff asks us to set aside the judgment entered against him. He contends that the evidence warranted the jury finding a verdict in his favor upon two grounds, viz.:

(1) Negligence in failing to warn plaintiff of the approach of the electric crane.

(2) That Wollpert was incompetent to operate the crane.

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CARPENTER, J. (*after stating the facts*). 1. Duty of warning. It is not contended by plaintiff that the duty resting on defendant of giving warning to plaintiff was a non-delegable duty for the performance of which defendant was responsible. It is contended, however, that a duty rested upon defendant to provide a method of warning, that this duty was a non-delegable duty and that it was not performed in this case. Whether such a duty rested upon defendant or not we do not feel called upon to determine, for we think the evidence proves that if there was such a duty, it was fully performed. It is true that the testimony shows that no rules on this subject were posted or formally promulgated. But it is also true that the testimony proves that it was understood generally, and particularly by Wollpert, the offending employé, that he "was to use all care possible; to keep his eyes peeled for anybody that might be in the way, and if they were in the way to call out and warn them." It appears, too, that he knew that plaintiff was working in the path of the crane, and that the accident happened, because, as he states: "I was talking with Mr. Avis and it [the plaintiff's location in the path of the crane] slipped my mind." No rule that could have been devised by defendant would have been better than the rule which Wollpert understood governed his action, and we, therefore, say that if the defendant was under any obligation to establish rules to warn plaintiff of the movements of the crane, there is no evidence that it failed to perform that duty.

2. Wollpert's competency. Was there any evidence from which the jury could have found a verdict for plaintiff upon the ground that Wollpert was incompetent? Wollpert went to work for defendant along the last of February or the first of March. Prior to that time, he had had no experience with an electric traveling crane. Soon after his employment by defendant, he commenced to operate the crane, and from that time until plaintiff's injury—this occurred May 11th—he operated it many times—he estimates two dozen times. It appears, too, that

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he was an intelligent man who had worked about machinery for two years before he became defendant's employé. It does not appear from the testimony that it required a long experience to learn to operate this crane. Indeed, I think it may be said that it is conclusively proved that Wollpert not only understood how to operate it but did operate it skillfully on this occasion. For at the first outcry from plaintiff he did precisely what was required to be done to avoid further injury. And the disaster resulted, not from his unskillfulness, but from a lapse of memory not inconsistent with skill and competency. The determining question is whether incompetency should be inferred from Wollpert's short experience. The record contains considerable opinion testimony bearing upon this question. We refrain from quoting it. But it may fairly be stated that from this testimony it cannot be inferred that a longer experience than Wollpert's was necessary to enable an intelligent mechanic to safely operate this crane. As bearing upon the requisite experience to insure competency, it is of some significance that plaintiff himself, who does not seem to have had any prior experience in running electric cranes, after his injury returned to defendant's employment and took "charge of this electric crane and was in a way able to run it with one hand." We do not think that this record contains any testimony from which the jury could infer that Wollpert was incompetent.

Another argument advanced by plaintiff compels us to consider the question: Was defendant responsible for the negligence of Hillprecht in performing a delegable duty? This question is answered in the negative by many decisions of this court. See *Guest* v. *Illuminating Co.*, 150 Mich. 438; *Amoe* v. *Engineering Works*, 151 Mich. 212, and authorities cited in these two opinions.

We conclude that the trial court properly directed a verdict in defendant's favor.

Judgment is affirmed.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

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SMAFIELD *v.* SMITH.

1. DRAINS—ENJOINING CONSTRUCTION—REMEDY.
   Owners of lands not traversed by a proposed drain, and who are therefore not parties to the proceedings, have a remedy in equity by injunction to restrain the construction of the drain where its effect will be to cast upon their land waters for which no outlet has been provided.

2. SAME—FLOODING LANDS—INJUNCTION.
   Owners of lands along a natural watercourse which has been improved at public expense for the purpose of furnishing an outlet for proposed drains, cannot enjoin the construction of such drains where it does not appear that their effect will be to flood complainants' lands beyond the degree contemplated when the stream was improved, or beyond the extent to which they were previously flooded.

Appeal from Sanilac; Beach, J. Submitted May 4, 1908. (Docket No. 49.) Decided June 27, 1908.

Bill by Franklin Smafield and others against John Smith and R. B. Walker, drain commissioners of Sanilac and Lapeer counties, to restrain the construction of a drain. From a decree dismissing the bill, complainants appeal. Affirmed.

Babcock Brothers, for complainants.

C. F. Gates, for defendants.

HOOKER, J. Black river runs in a southeasterly direction and empties into the St. Clair river. Elk creek flows northeasterly, emptying into Black river. The complainants own lands in severalty, situate along Elk creek, some miles above its mouth, including some bottom or flat lands along the creek. The testimony indicates that Elk creek is the natural outlet for the water of a large area.

Counsel for the complainants allege that in the year

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1899 the drain commissioner of Sanilac county instituted proceedings to clean out, deepen, and widen Elk creek for its entire length, and that this was done, and that so much of the creek as was below a point some miles above complainants' lands was made a "ten-foot bottom" after which, for a few years, complainants' lands were not flooded to any extent, but that subsequently other and lateral drains were constructed conducting water to Elk creek, above their premises, when the creek began to overflow its banks, and this tendency has increased from year to year until at the present time great damage is done to their land and crops by freshets.

They claim, further, that the defendants, who are drain commissioners of Sanilac and Lapeer counties, respectively, are now seeking to construct a new drain, to be called the Lapeer and Sanilac drain, the outlet of which is to be in Elk creek above complainants' lands, and that this drain will take water from some 6,000 acres, and will still further swell Elk creek in times of high water, and increase the damage to the complainants' lands. Previous to or during 1888 the Elk, Flynn, and Maple Valley drain was constructed. It entered Elk creek below complainants' premises, some six miles. That drain is yet in existence and use, though it has become somewhat obstructed and has in places been changed in its course by persons through whose lands it passes.

In the main it parallels Elk creek a few miles from it. It is now proposed to intercept this drain by the Lapeer and Sanilac drain and to widen, deepen, clean out, and extend the same, above the point of intersection, which will have the effect of turning some, though not all, of its water into Elk creek above complainants' premises, the remainder passing down through the old drain.

The complainants have filed the bill in this cause, to restrain the construction of this drain, upon the ground that it will subject their lands to an increased and unnatural flow, to their irreparable injury. The cause was heard at circuit upon its merits, where the bill was dismissed and

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it is before us upon complainants' appeal. The defendants contest the complainants' claim to relief upon two grounds, viz., *first*, that complainants have mistaken their remedy; *second*, that they have failed to make a case entitling them to relief upon the merits.

In substance, the complainants ask a restraining order to prevent defendants from turning upon their land a quantity of water from a proposed drain whose outlet is Elk creek at a point above complainants' land. The proposed drain not traversing their land, and complainants not being parties to it, the case would seem to be similar to that of *Bruggink* v. *Thomas*, 125 Mich. 9, where it was held that the complainant had a remedy by injunction. See, also, *Smith* v. *Township of Eaton*, 138 Mich. 514; *Township of Merritt* v. *Harp*, 141 Mich. 254. We have no doubt of the jurisdiction of equity in such a case. This leaves the case to be disposed of upon the merits.

The source of Elk creek appears to be on section 11 of Maple Valley township in Sanilac county. The evidence discloses that in 1899, extensive improvements were made in that stream by dredging, so that upon the section upon which it is said to have its origin, a channel 10 feet wide upon the bottom was made. This improvement extended the entire length of the stream which was deepened as well as widened. There is evidence that this improvement was made with a view to its becoming an outlet of water which fell upon the surrounding country which naturally found its way to Elk creek, and that it was contemplated that such water would be discharged through prospective drains. Two or more townships were assessed for benefits, a strip of land 50 or 100 feet wide was condemned or purchased for the purpose, and presumably these complainants were paid for such as was taken from them. Some or all of them took jobs and received their pay for their assistance in making the improvement. They were not assessed for benefits.

While it is true that a drain commissioner must not turn water upon adjacent lands without providing an ade-

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quate outlet, such outlet may be provided in advance and commonly must be. We are not satisfied that the proposed improvement will have the effect of flooding complainants' lands beyond the degree which was justly contemplated when the Elk creek drain was made, or beyond the extent to which they were previously flooded, and we are confirmed in this opinion by the action of the learned circuit judge who saw the witnesses and heard their testimony.

The decree is affirmed, with costs.

OSTRANDER, MOORE, CARPENTER, and MCALVAY, JJ., concurred.

MOTT v. PENOYAR.

1. CONTRACTS—BREACH—ACTION—EVIDENCE—SUFFICIENCY.
   In an action for breach of certain contracts by which plaintiff agreed to cut and manufacture the timber on certain lands which defendant represented to belong to him, the breach consisting in failure of defendant's title to the land, evidence examined, and *held*, that there was sufficient testimony, if believed, to go to the jury on the issue how much timber was cut under the several contracts before plaintiff was stopped by the owner of the lands.

2. SAME—ACTION—ACCRUAL—DAMAGES.
   Where defendant employed plaintiff to cut and manufacture the timber standing on certain lands, which defendant falsely represented belonged to him, plaintiff was entitled to damages for the breach of the contract, and the amount of timber cut before plaintiff was stopped by the owner of the land was an element of the damages to be considered, regardless of the terms of the contract as to the time of payment.

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3. HARMLESS ERROR—ADMISSION OF EVIDENCE—FACTS OTHERWISE ESTABLISHED.

In an action for damages for breach of a contract by which plaintiff was employed by defendant to cut the timber on certain lands, which defendant falsely represented belonged to him, the allowance of improper questions to defendant's superintendent, on cross-examination, as to statements made by him to the effect that defendant did not own the land, was not hurtful where it was otherwise conclusively proved by competent testimony that defendant did not own the land.

4. CONTRACTS—BREACH—ACTION—EVIDENCE—ADMISSIBILITY.

In an action for breach of a contract by which plaintiff was employed by defendant to cut the timber on certain lands, which defendant falsely represented belonged to him, the rejection of certain title deeds and bills of sale, which defendant claimed would establish his title to a part of the lands, was not error, there being no claim of title to the whole.

5. SAME—GOOD FAITH.

The papers were not admissible as tending to show defendant's good faith, since good faith would not relieve him from the consequences of his want of title.

6. TRIAL—INSTRUCTIONS—SUFFICIENCY.

An assignment that the court erred in not instructing the jury that there could be no recovery under items 3 and 5 of the bill of particulars is not supported where it appears that the court instructed as to what items in the bill they might consider, and items 3 and 5 were not among them, and the court said in a discussion in the jury's presence that such items were not to be considered.

Error to Iosco; Connine, J. Submitted May 5, 1908. (Docket No. 70.) Decided June 27, 1908.

Assumpsit by William H. Mott against Wedworth C. Penoyar under section 10421, 3 Comp. Laws. There was judgment for plaintiff, and defendant brings error. Affirmed.

M. L. Courtright, for appellant.

Bennett & Moore (*William T. Yeo*, of counsel), for appellee.

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HOOKER, J. The plaintiff claims to have entered upon the performance of two contracts, one written, the other oral, by which he undertook and promised to cut and manufacture into lumber all of certain kinds and grades of timber, standing upon lands of the defendant, described in said contracts; that after partly performing the same, he discovered that the defendant was not the owner of said lands, and he was prevented from the further performance by the real owner of the lands. He has brought this action alleging deceit and fraud and asking damages, his bill of particulars furnished upon demand of defendant's counsel being as follows:

"From May 7th to October 10th, 1905, inclusive:

(1)	"To building lumber camps and roads.....	$200 00
(2)	"To moving engines, boilers and mills.....	800 00
(3)	"To loss on materials furnished, camp equipage, lumbering outfits and mills.....	600 00
(4)	"To money paid for board and labor of men while idle in consequence of breach of contract.....	800 00
(5)	"To loss of benefits, gains and profits in favor of plaintiff caused by plaintiff being prevented by defendant from performing said contract as alleged in declaration..	7,000 00
(6)	"To balance remaining due and unpaid on the lumber cut under verbal contract between plaintiff and defendant as to timber on lands other than those described in written contract.....	600 00
(7)	"To balance due for lumber manufactured from a portion of the lands described in written contract before plaintiff was compelled to discontinue further work under such written contract.....	500 00
	"Total.....	$10,000 00"

The trial resulted in a judgment for $1,404.75 in plaintiff's favor. Defendant has appealed.

Points made in defendant's brief:

1. "There being no evidence as to the amount of lumber gotten out *under each contract, items 6 and 7*, in the bill of particulars should have been withdrawn from the

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consideration of the jury, and the court should have instructed the jury, under the evidence, that there could be no recovery on either of these items."

Items 6 and 7 related to balances earned by manufacture of lumber. There was evidence sufficient to go to the jury in relation to this. Some of it consisted of estimates and there was also testimony of inspections. While there was no separation of amounts in the inspections, the plaintiff testified to the maximum amount cut under the written contract, which made the ascertainment of the minimum cut under the oral contract a matter of subtraction merely, if the testimony was believed. It was contended that, under the terms of the contracts, said balances were not due and for that reason the court should have taken items 6 and 7 from the jury. This claim cannot be sustained, for the reason that if the jury sustained the claim of plaintiff upon the second count, he was entitled to damages for the breach of the contract, which right accrued at once, and a balance earned was an element to be considered, regardless of the terms of the contract as to the subject of payment. *Hosmer* v. *Wilson*, 7 Mich. 294; *Platt* v. *Brand*, 26 Mich. 173; *Obenauer* v. *Solomon*, 151 Mich. 570. Some other points are made in this connection, but none that would require the instruction contended for and therefore we do not discuss them.

2. "The court erred in allowing improper, prejudicial and incompetent questions to be asked regarding statements made by Charles Crawford, defendant's superintendent, and improper and prejudicial questions to be asked of him."

Mr. Crawford was defendant's superintendent. He was called by the defendant, and on cross-examination he was interrogated about conversations with various persons concerning his knowledge and statement regarding defendant's want of title, and motives in making the contracts in question. Upon the whole record, including the defendant's own statements that he did not own some of

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the land, it is beyond dispute that he contracted for the cutting of timber that he did not own. Hence such cross-examination, and some testimony of the plaintiff, taken before Crawford was sworn, was not hurtful, even if it was improperly admitted. It was only cumulative testimony upon a point conclusively proved by competent testimony. It may truly be said that the testimony of statements made by Crawford to the effect that he was not surprised at plaintiff being stopped, by the State agent and others, from cutting, for the reason that "defendant did not practically own all the land that the timber was on" might lead the jury to think that defendant did not own the timber, but the consequences of his not owning practically all, would be no more effective as a breach of his contract, than his want of title to a substantial portion of the land or timber. Some of the testimony was properly admitted as res gestæ; other parts of it were in the nature of impeachment of defendant's witness.

3. "The court erred in not allowing the defendant to introduce in evidence the tax deeds issued to him or Penoyar Bros. of a portion of the lands described in the contract."

It is claimed that the defendant had some deeds and bills of sale, which he offered in evidence, and which were excluded. Counsel stated at the time that he wanted them in evidence as the basis of the defendant's title. They were marked as Exhibits Nos. 13 to 43 inclusive. They are not printed, and we are unable to say from the record that any of them would have tended to show that the defendant had title. But we understand that no one claims that these deeds and bills of sale would have established defendant's title to all, or substantially all, of the lands or timber, and their introduction would not have justified the claim that defendant had not broken his contract, or that they would have changed plaintiff's right to treat the contract as terminated, nor would they have affected the measure of damages.

It is also asserted that these papers would have tended

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to show defendant's good faith. His good faith would not relieve him from the consequences of his want of title. Again, it does not appear that any of them ran to the defendant, and we discover no showing of competency. Defendant was given the opportunity of showing his good faith by any competent testimony.

4. "The court failed to instruct the jury that there could be no recovery under items 3 and 5."

The court instructed the jury as to what items in the bill of particulars they might consider. Nos. 3 and 5 were not among them, and in a discussion of the subject, in the jury's presence, on the argument relating to requests to charge, the court said that they were not to be considered. We think that the subject was made plain.

5. "The court for a number of reasons should have instructed the jury that the plaintiff could not recover."

We have covered all the points discussed in the brief under this head in what has been said.

6. It was not error to submit the cause to the jury on the special count.

We find no error, and the judgment is affirmed.

OSTRANDER, MOORE, CARPENTER, and MCALVAY, JJ., concurred.

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LAETZ v. TIERNEY.

1. LANDLORD AND TENANT—CHATTEL MORTGAGES—FORECLOSURE—DESTRUCTION OF BUSINESS—LIABILITY OF MORTGAGEE.
   Where a lease gave the landlord the right of re-entry in case of nonpayment of rent, and he also had a chattel mortgage on the stock and fixtures on the premises belonging to the tenant giving him the right on foreclosure to sell at private sale without notice, he was not liable to the tenant-mortgagor for damages for destroying and breaking up his business where, the tenant being in default on both instruments, he went peaceably into the store and suggested that the tenant "give up the ghost," and on the tenant's declining to do so without the advice of counsel, and leaving the store to obtain such advice, he locked the door and retained possession for the purpose of foreclosing.

2. APPEAL AND ERROR—REVERSAL—NOMINAL DAMAGES.
   A judgment for defendant will not be reversed where plaintiff could recover only nominal damages in any event.

Error to Bay; Collins, J. Submitted May 7, 1908. (Docket No. 120.) Decided June 27, 1908.

Case by John G. Laetz against Peter Tierney and Harry J. Tierney for an unlawful seizure of certain mortgaged property. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Affirmed.

George R. Fox (*James Van Kleeck*, of counsel), for appellant.

Weadock & Duffy, for appellees.

HOOKER, J. The plaintiff was a saloon keeper doing business in a building leased by him from the defendant Peter Tierney. The lease was in writing and contained a covenant to pay rent and the following provision:

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"Provided, that in case any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part, his certain attorney, heirs, representatives and assigns, to re-enter into and repossess the said premises, and the said party of the second part and each and every other occupant to remove and put out."

The lease was dated August 5, 1905.

In May or June, 1906, the plaintiff executed and delivered to defendant a chattel mortgage to secure a debt of $200. It covered the following property:

"One National cash register, six pairs curtains, one kitchen stove, one gas stove, all gas fixtures, twelve chairs, three tables, one desk, all stocks of wines, whiskeys, beer, and other liquors of every kind and description, all glasses, two mirrors, about twelve artificial palms, one clock, and, in fact, all my personal property of every kind and description."

It contained stringent provisions as to taking possession and foreclosure, with the right to sell at private sale without notice.

Being in arrears both in the rent and the chattel mortgage debt, the defendant called at plaintiff's place of business and suggested that plaintiff "close up the business," or, as plaintiff testified:

"He says: 'You better give up the ghost.' I says, 'No, Harry, I don't want to give up; if got to close this place up I want to see legal advice first,' and I went out. He says, 'You can.' I went out, and while I was gone to get legal advice, it took me only half an hour, and not quite that even, the place was locked against me when I came back. Hyman Mitchell was in possession. I had a talk with the Tierneys after that about regaining possession. When I went out to get legal advice from an attorney, I went to Mr. King's office first in order to get the 'phone to call Mr. Fox; from there I went to Mr. Fox's office. I returned then directly with Mr. Fox. I made an attempt to try the door and it was barred. When I left there to get advice, I left the bartender, Mr. Hyman; he remained there until the time he was told to get out in the evening; he was in the building when Mr. Fox and I

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came back and attempted to get in. I went home after that, and I got back and the whole place was locked up and I couldn't get in at all. I did not tell Mr. Hyman to leave or give up possession. After that Hyman Mitchell and the Tierneys, very likely, remained in possession. The business was closed. It remained closed until the sale, and it was opened again after that, after someone bought it on a private sale; they commenced to use the building I had rented."

This action was subsequently brought, plaintiff claiming damages against the defendants for breaking up and destroying his business by unlawful acts. The court directed a verdict for the defendants.

Plaintiff claims that the defendants seized and sold the property on the chattel mortgage, and took possession of the store wrongfully and withheld it from him. The undisputed proof shows that the defendants, being lawfully in the store, took possession of the chattel-mortgaged property, bolting the door for the purpose of taking an inventory, plaintiff's bartender remaining and aiding in taking an inventory until, that being done, he was told by the defendants that he would not be needed longer. The mortgage covered all the personal property belonging to plaintiff and after its seizure, which was rightful, there is nothing to indicate either an ability or desire by the plaintiff to continue the business. It is obvious that he had no right of recovery growing out of the seizure and sale of the property. Under the terms of the lease he had forfeited the right to the possession of the premises, and by his own express covenant the plaintiff had a right to reenter and put him out.

There was nothing in the nature of force in the entry, or in obtaining possession, although there was proof that plaintiff's lawyer afterwards demanded possession. The plaintiff bases his action on the claim that he had a right to possession, although his own contract shows that he had no such right and that defendant had such a right. The question was passed upon in, and the case is ruled by, our decision in the case of *Smith* v. *Building Ass'n*, 115

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Mich. 346. See, also, *Murphy* v. *McIntyre*, 152 Mich. 591.

Again, the court was correct in saying that no damages, beyond nominal damages, were proven in the case, even upon the plaintiff's theory, and this would not call for a reversal. *Hickey* v. *Baird*, 9 Mich. 38; *Haven* v. *Manufacturing Co.*, 40 Mich. 286; *Lewis* v. *Railway Co.*, 56 Mich. 638; *Stevens* v. *Yale*, 113 Mich. 680; *Wilcox* v. *Morton*, 132 Mich. 64.

The judgment is affirmed.

OSTRANDER, MOORE, CARPENTER, and MCALVAY. JJ., concurred.

MARTIN *v.* VEANA FOOD CO.

1. FRAUD — MISREPRESENTATIONS — EXPRESSIONS OF OPINION — INDUCING PURCHASE OF STOCK.

   Representations by the officers of a limited partnership association, to induce the purchase of stock, that there was a constantly increasing demand for the product of the association's factory, that it had a plant costing about $100,000, that the experimental stage had long since been passed and the basis of assured success well laid, and that the output of the factory was over 1,000 pounds of product per hour, which would show a profit of 35 per cent. on the investment, were not mere expressions of opinion, but were statements of fact, for which, being false, an action lies.[1]

2. SAME — LIABILITY.

   Though one may, without legal liability for results, permit another, for a consideration, to share his hopes, however adroitly the statement of his hopes may be phrased, he may not

[1] As to expression of opinion as fraud, including question what constitutes expression of opinion, see note to *Hedin* v. *Minneapolis Medical, etc., Institute* (Minn.), 35 L. R. A. 417.

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by actual misstatement, without liability, induce the belief that the venture is without other risk than the usual risk of an established and prosperous business.

3. SAME—EVIDENCE—ADMISSIBILITY.

In an action for fraud in inducing plaintiff to purchase shares in a limited partnership association as a part of the consideration for his appointment as district manager under a contract contemplating his sale of 300 cases of goods per month, evidence was admissible tending to show that it was impossible or unlikely that a manager could sell the amount specified.

Error to Eaton; Smith, J. Submitted May 7, 1908. (Docket No. 108.) Decided June 27, 1908.

Case by Louis H. Martin against the Veana Food Company, Limited, and others, for fraud and deceit. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Reversed.

Stewart & Sabin, for appellant.

Garry C. Fox (*Moore & Moore*, of counsel), for appellees.

OSTRANDER, J. Plaintiff, on September 30, 1904, purchased from defendant association, at par, and paid for, $1,000 of its capital stock. Later, in December of the same year, he asked the association to take his stock and repay him his money. This it did not do. His action is for damages for fraud and deceit. At the trial, plaintiff having closed his case, the court directed a verdict for defendants and judgment was entered on the verdict. The errors assigned make it necessary to determine whether, upon that view of the testimony, admitted or wrongly rejected, most favorable to plaintiff, there were questions which should have been submitted to the jury. The defendant association was organized March 10, 1902, with a capital of $500,000, in shares of one dollar each. Ten thousand dollars in cash was paid in by ten men, each of whom received $25,000 of stock. Of the $350,000 of stock

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represented as paid, the remainder was first given, or paid, for a formula for making flaked goods. Of this, 68,000 shares, and perhaps a greater number, were afterwards turned in to the treasury. Various persons purchased stock at from 10 to 25 cents a share to the amount of $9,925. A factory was built at an expense of $47,000, money for this purpose being borrowed as was necessary. Manufacture of food was begun in May or June, 1903. On September 1, 1904, the association was overdrawn at the bank $10,820.71, and had a total indebtedness apparently of more than $34,000. Sales of stock were made, at par, to persons appointed district managers, to the amount of $51,325. Plaintiff's connection with the association is best shown, though at the expense of considerable space, by the following recital and by documents, copies of which are given. He was employed at Aurora, Illinois, when he read in the Scientific American, in its issue of September 3, 1904, the following advertisement:

"Reliable man wanted. A prominent cereal food company will contract with thoroughly reliable man for two years at $150 a month, together with commission and office expenses. Highest references required. Address, 'Auditor, Box 475, Bellevue, Mich.'"

Plaintiff wrote to the address and in reply received a letter from defendant company, inclosing a prospectus. The following is the letter:

"J. R. Hall, Chairman. T. E. Robinson, Secretary
"F. M. Mulvaney, Treasurer. and Gen'l Man'gr.
"THE VEANA FOOD CO., LTD.
"Manufacturers of Veana Flaked Cereal Food.

"BELLEVUE, MICH., Sept. 13, 1904.

"L. H. MARTIN, Aurora, Ill.

"*Dear Sir:* Your valued favor of recent date in reply to our advertisement has been received and filed; replying to same, we will endeavor to give you a brief, yet intelligent, idea of the situation, and then if interested we will take the matter up with you in detail. We are engaged in the manufacture of 'Veana Flakes,'—undoubtedly the acme of perfection in the cereal food line; there is a constantly increasing demand for our product, and in

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order to afford better facilities for the handling of our goods we have decided to open several branch offices or distributing depots, and are now in search of competent men to take charge of same. We have recently adopted the co-operative system of doing business, and believe that our best employés, who hold responsible positions with us, should participate in the profits they help to make.

"Our company is incorporated under the laws of the State of Michigan with an authorized capital of $500,000. At a recent meeting of the board it was decided to set aside $100,000 worth of stock, which is to be offered until Jan. 1, 1905, to our branch office managers in blocks of from 1,000 to 5,000 at par one dollar per share, which must be paid for in cash at the time of closing contract; we do this for the reason that our experience and that of other well-known concerns has proven beyond doubt that when a man has a financial interest in the company he represents, he puts forth a much better effort than were he merely an employé; therefore, in order to secure the best possible results from our branch office managers we deem it imperative that our trusted employés be financially interested with us.

"Our proposition is not made through philanthropic motives, but is based upon purely business principles, and we court from those who are in a position to meet the requirements the closest investigation.

"To put the entire proposition to you in a nutshell, we want as branch office managers men of ability to interest themselves with us financially, morally, and commercially, with a view of producing by concentrated effort the best results possible. The minimum investment that can be made by our branch office managers with us is $1,000 and the maximum $5,000, and with men of whom we approve we are prepared to close a two years' contract at a salary of $1,800 per annum payable monthly, and ten per cent. commission on the business done through his territory except the first 300 cases per month, also fifty cents per case on all goods sold by his individual efforts, so that a hustler ought easily to make $5,000 per year. In addition he will receive the dividends accruing to his stock, which is fully paid and non-assessable; we will rent and furnish at our own expense, office quarters and warehouse facilities. We are thoroughly established, have a plant which stands alone in its class, both from architectural and mechanical engineering standpoints, which has cost about $100,000, will produce daily 600 cases of better food at a lower price

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and consequently at a higher profit, than any factory yet built. Our entire proposition is co-operative, it being, as we have stated before, our firm belief that concentrated effort will bring results obtainable in no other way.

"The duties of a manager will be to secure, employ, and superintend a force of local and traveling salesmen to cover the territory which we assign him; in short, he is to have general control of, and supervision over, the business of his department, and to handle same as though it were his own; if a man has managerial ability and will follow our instructions he can readily adapt himself to our business. The credits and collections will all be handled from the home office so that a man can give his undivided attention to the sale of our goods.

"If you are interested from what we have told you of our proposition, you can secure from either Dun or Bradstreet our rating, also the very best banking references and other evidence of our standing, and we shall expect equally as good references from the man who wishes to take up and expects to fill so important a position as that of branch office manager of this company. If you feel that you are in a position to meet with all the requirements as outlined, and would like to go into the matter in full detail, write us—but do not simply ask for details—make your questions specific and right to the point.

"We shall also be pleased to hear from you at an early date, giving us your references and a brief statement relative to your experience, in order that we may ascertain if you are the man we are looking for.

"Hoping that we may be favored with a prompt reply, we beg to remain,

"Yours respectfully,

"THE VEANA FOOD CO., Limited,

"T. E. ROBINSON."

The prospectus:

"THE VEANA FOOD COMPANY, LIMITED,

"Capital Stock, $500,000.

"Bellevue, Michigan.

"Officers.

"*Chairman*, J. R. Hall,

"*Treasurer*, F. M. Mulvaney,

"*Secretary and General Manager*, T. E. Robinson.

"PROSPECTUS.

"The Veana Food Company, Limited, having profited

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by the experience of all other large food plants, has today the finest and best equipped food plant in Michigan, if not in the world; not the largest or most elaborate, but the most complete; in fact, a *perfect* plant. While most of the food companies handle their product in a very crude and expensive manner, the Veana Food Company will not lay a hand on its product from the time it enters the hoppers until it comes out in cartons. Nothing has been left out and no modern idea overlooked.

"Unless one has given thought and attention to the cereal food business, the rapid growth and fortunes that have been made in it read more like some tale of enchantment from Arabian Nights. A volume could be written on the subject, but we cite only two instances: one manufacturer began seven years ago in a barn in Battle Creek, with scarcely a dollar of capital—in fact, had to borrow money for the purpose, and his advertising was done on credit; now he is a multimillionaire and the sales of his factory in 1902 were over $4,000,000, after spending $600,000 in advertising. Two years ago the stock of another company went begging at 17 cents on the dollar—it is now worth twelve and one-half times par value, and the company is incorporated for several millions. It might be well to state right here that the remarkable growth of Battle Creek during the past two years is directly attributed to these two food companies, —over two thousand houses having been built in a single year.

"After careful investigation of the co-operative system now in use by the Carnegie Steel Co., the National Cash Register Co., Proctor & Gamble, Sir Thomas Lipton (the world's greatest tea merchant), et al., it has been found that the phenomenal success of these well-known concerns was attributed largely to co-operation, and clearly demonstrated the merit of the system; therefore on June 1, 1903, the Veana Food Co., Ltd., decided to adopt the co-operative system, and there can be no question but that by giving their branch office managers an active and financial interest in the business, it will undoubtedly distance all competitors in a very short time, and secure results not obtainable by any other means. Not only is it gathering about itself a small army of gallant workers who stand shoulder to shoulder, all working together for the good of the whole, but it has made it possible for them quickly and radically to better their own fortunes.

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Should any one of our branch office managers start in business for himself with a capital of $1,000 or even $5,000 he would cut little figure in these days of competition—we do not care what line he selected, nor in what town he located; but by joining hands with us, he not only has the advantage of many thousand dollars, but of the full-fledged factory besides.

"The food situation of today is past the speculative stage, it having proven itself the best investment of the day. The truth of the statement can be easily verified by consulting the mercantile agencies in regard to food investments during the past three years.

"In order to appreciate the value of our earning capacity, it should be remembered that we have an output of over 1,000 pounds an hour of chemically pure food, which will show a net profit of thirty-five per cent. on the investment. The success of this company is not a matter of speculation, for two very important reasons: *First*, this is a cereal food age in which the public with increasing discrimination demands cereal foods, selects and continues to use that which is best, and to make rich the men who manufacture and market it. *Second*, the men at the head of this company thoroughly understand this business in every detail; having demonstrated that it can and does produce an article of superior merit; in fact, the experimental stage has long since been passed and the basis of assured success well laid.

"In addition to our food plant we have installed a 3,000 light generator for the purpose of furnishing light and power for Bellevue, the company having already secured a five-year contract and thirty-year franchise. The electric light plant will be operated without any additional cost of labor, as the same engineer corps will run both plants. This is of tremendous import to the average stockholder or prospective investor in the Veana Food Co. The lighting plant will not only increase the company's revenues but will vastly help to make it independent.

"It is the purpose of this company to establish one branch office in each State in the Union for the sale and distributing of Veana Flake Food; placing in charge of same men of sterling integrity and business ability. We are in need of good, reliable men, and those who can properly qualify need never look further for employment."

Plaintiff visited Bellevue, went over the plant of the

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company, and, as has been stated, he purchased 1,000 shares of stock and entered into the contract indicated by the correspondence. The testimony tends to prove that defendant Robinson said the business was in a prosperous condition; that some of the agents were very successful and others not as successful; that there had been invested in the business from $100,000 to $125,000; that the business was successful and was paying about 30 per cent. Nothing was said about the indebtedness of the company, and no inquiry made concerning it. The testimony further tends to prove that whatever hopes may have been entertained by the promoters of this association, it was not, when plaintiff purchased his stock, conducting a successful business, was not prosperous, was not solvent. The product it manufactured was without any considerable reputation in a market where competition was swift and sharp, and, except that it was an organized concern with a plant for manufacturing a flaked food and had to some extent, by advertising and in other ways, exploited its business, it had nothing to offer to any purchaser of its stock except a place in an adventure, the history of which was not, especially in the absence of large sums available for advertising, prophetic of final success. It did, in fact, fail of success.

It must have been expected that plaintiff would rely upon the representations, *first*, that there was a constantly increasing demand for the product; *second*, that there was a plant which had cost about $100,000; *third*, that the experimental stage had long since been passed and the basis of assured success well laid; *fourth*, that—

"In order to appreciate the value of our earning capacity it should be remembered that we have an output of over 1,000 pounds an hour of chemically pure food, which will show a net profit of thirty-five per cent. on the investment."

These are not mere expressions of opinion and do not relate to immaterial matters. When these printed repre-

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sentations were followed by the express oral statements of officers of the company to the effect already stated, it cannot be said that the plaintiff and the defendants were dealing on even terms, that deceit, with or without malice, was not practiced to the injury of plaintiff.

The testimony of the secretary and general manager is:

"We felt the need of money at that time; we were like most anybody, we need money all the time. April 30, 1903, at the time of this meeting [when the plan was authorized], was before we began to manufacture our product; that was just when we were finishing our mill. We found ourselves in need of money and an output of our product."

At different times, some 50 agents or district managers were appointed after purchasing stock. Some of them had contracts requiring them to sell no more than 200 cases each month and it appears that failure to sell this amount did not in every case deprive the manager of his salary. The same witness further testified concerning his interview with plaintiff, which, as we have seen, was in 1904:

"And I told him we had a good plant, we had a good food; that we were working most of the time; that some of our managers were good and some were not so good; that we did not want any dead ones, that we wanted live ones, and for the man that was a live one we had a good proposition; and told him that the territory, in order to make the office pay expenses in good shape, should furnish 300 cases a month; and I told him that he or anyone else that didn't think they could sell that, that we didn't want them; that we had had some that had fallen down and weren't any good; and I marked out to him on a paper there how he could—what the sale of 300 cases would mean, $150 a month and his commission would start on over and above the 300 cases and 50 cents per case on his own individual efforts. That was about the limit of the conversation that I had with him. Mr. Hall was there and he was in his company a good share of the time after that."

Coupled with the statement that the business was prosperous, this was a direct representation that a good man-

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ager ought to secure sales of 300 cases per month, and more. It was both an inducement to buy stock and a representation of its value. Undoubtedly, one manager of the sales of goods will excel another manager in the same territory, but at this time (1904) the defendant company and its officers had had an experience of more than a year in the sale of their product and had employed various managers in various States. The same witness testified:

"The first year we were at it we did very little; we went at it in a very mild way, and then the next year the market was flooded with so many kinds of foods and the quality was such that complaints came in from our customers and the like of that that the stuff was not moving, and I should say that was in 1904, some time, the summer and fall, perhaps. Very soon after we started we found there was competition and very strong. We finally found it became very fierce. The competition was quite strong. The demand fell off some and shortened up in the winter months of 1903 and 1904, and then again in the fall of 1904 and 1905. It wasn't pleasant, lots of it. We were selling some, but not a great deal. We figured out a profit in the goods provided we could sell them."

Plaintiff was not given an opportunity to try to sell the goods before investing in the stock. If, therefore, in the experience of the company no manager had ever been able to sell 300 cases of the food per month, the offer made to plaintiff to sell him the stock at par upon such conditions, coupled with the statements of the general manager, and the representations of the prospectus, was a misrepresentation. The argument that defendants had the right to enter into such contracts with agents as it, and they, pleased, that if plaintiff and other managers had performed their contracts the salaries could have been paid and the stock would have been valuable, that in the absence of actual bad faith defendants should be held innocent, is not convincing. There is testimony tending strongly to prove the honest belief of defendants in the ultimate success of the enterprise. Undoubtedly, one may, without legal liability for results, permit another,

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for a consideration, to share his hopes, however adroitly the statement of his hopes may be phrased. He may not, by actual misstatement and without liability, induce the belief that the venture is without other risk than the usual risk of an established and prosperous business. The claim of plaintiff is that defendants represented as actual that which they hoped might become actual; that he paid his money, relying upon the representations. We are of opinion that it cannot be said, as matter of law, that plaintiff is entitled to no relief.

What has been said disposes of most of the alleged errors. Under the circumstances, plaintiff should be permitted to show, if he can, that it was impossible or unlikely that a manager could perform his contract to sell 300 cases of the food each month. Other questions presented are not likely to arise upon a new trial.

The judgment is reversed, and a new trial granted.

HOOKER, MOORE, CARPENTER, and MCALVAY, JJ., concurred.

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PEOPLE v. RANNEY.

1. CRIMINAL LAW—CORPUS DELICTI—PROOF—CONFESSIONS — SUFFICIENCY.
   It is the general rule that the corpus delicti may not be proved by the naked extrajudicial confession of accused.

2. SAME—CORPUS DELICTI—WHAT CONSTITUTES.
   Logically the corpus delicti includes only the fact of the specific loss or injury sustained, though some of the cases hold that it also includes the fact of someone's criminality as the source of the loss.[1]

3. SAME—CONFESSIONS—CORROBORATION—SUFFICIENCY.
   The corroboration of accused's extrajudicial confessions necessary to establish the corpus delicti refers to facts which concern the corpus delicti, facts tending merely to produce confidence in the truth of the confession not being sufficient.

4. SAME—FALSE PRETENSES—CONFESSIONS—CORROBORATION—SUFFICIENCY.
   In a prosecution for false pretenses in procuring funds on a worthless check, evidence examined, and *held*, that though there was no evidence that the check was worthless other than the fact that it had been forwarded in the usual course of business to a distant State and returned unpaid, there was sufficient corroboration of respondent's confessions to support a conviction, assuming that the corpus delicti includes not only the fact of the specific injury, but the element of someone's criminality as the source thereof.

5. SAME—TRIAL—INDORSING WITNESSES.
   Counsel for respondent, before learning the nature of the testimony to be elicited from a new witness, stated that he would need time to send to New York to find out a fact, but, upon learning the fact to be proved by the witness, said that his position was that the fact was immaterial, and no motion

[1]As to proof of corpus delicti, see note to *Bines* v. *State* (Ga.), 68 L. R. A. 88.

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for time was made. *Held*, that it was not error to indorse the name of the witness on the information and permit him to testify.

6. SAME—ARGUMENT OF COUNSEL—PREJUDICE.

A statement made by the prosecuting attorney, in argument, to the effect that respondent was committing adultery every day, the purpose being to discredit him because of his immorality, was not prejudicial, though there was no proof that either respondent or the woman with whom he was traveling was married, where it appeared that they were registered at hotels as man and wife and were not married.

Error to the superior court of Grand Rapids; Stuart, J. Submitted May 7, 1908. (Docket No. 127.) Decided June 27, 1908.

Melvin C. Ranney was convicted of obtaining money by false pretenses, and sentenced to imprisonment for not less than 1 year, nor more than 10 years, in the Michigan reformatory at Ionia. Affirmed.

William B. Brown, for appellant.

John W. Powers, Assistant Prosecuting Attorney, for the people.

OSTRANDER, J. Respondent is charged, in the information, with obtaining money by false pretenses. The pretenses alleged are that he was owner of a certain check and order for the payment of money, that the check was of the value of $50, and that there was on deposit at the place of payment designated in the check $50 with which to pay it when presented, and that said sum would be paid to the complainant, or bearer, upon presentation of the check, and that there was at the place of payment a book, No. 583, and would be when the check was presented, and that said book showed a balance on deposit of $478. A copy of the check is set out, as follows:

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"New York, April 4, 1907. $50.00
"Pay on Book No. 583.
"Union Dime Savings Institution.
"Broadway, 32nd St. & 6th Ave.
"Fifty dollars, to myself or bearer, and this shall be your receipt.
Signature, "L. J. CAMERON.
"Individually, or as trustee, as the book reads,
"Present Address, Grand Rapids, Mich.
"Previous Balance $478.00.
"Endorsed on Back, M. C. Ranney, J. E. Rice."

The record discloses that respondent procured the check to be cashed at a hotel where he was stopping, paid his bill out of the proceeds and retained the balance. The hotel keeper indorsed the check and negotiated it with a merchant, who deposited it in a local bank for collection. It was sent by the local bank to New York city and returned unpaid. There is no other testimony tending to prove that the check was ever presented at the designated place of payment. Beyond the fact that the check was so forwarded and so returned unpaid, there is nothing tending to prove the check was worthless except an alleged confession of respondent, testified to by officers who had him in charge.

It is contended, and it is the principal question presented, that there was no sufficient proof of the commission of the offense. The proposition advanced is that the commission of a felony cannot be proved by the extrajudicial confession of the accused. Applied to this case, this means that guilt of the respondent may not be determined by his confession that the check was, and was by him known to be, worthless; that the people were bound to show presentation of the check to the Union Dime Savings Institution, in New York, if such an institution existed; that it was not drawn against funds, that payment was refused.

It is the general rule that the corpus delicti may not be proved by the naked extrajudicial confession of the accused. 12 Cyc. p. 483; 6 Am. & Eng. Enc. Law (2d

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Ed.), p. 582; Wharton on Criminal Evidence (9th Ed.), §§ 632, 633; *People* v. *Lane*, 49 Mich. 340. The question presented leads to the inquiry, What is the corpus delicti in a case like this one? In 3 Wigmore on Evidence, § 2072, it is said that an analysis of every crime, with reference to this element of it, reveals three component parts, *first*, the occurrence of the specific kind of injury or loss (as, in homicide, a person deceased; in arson, a house burnt; in larceny, property missing); *secondly*, somebody's criminality as the source of the loss,—these two together involving the commission of a crime by somebody; and, *thirdly*, the accused's identity as the doer of this crime; that the term corpus delicti seems in its orthodox and its logical sense to signify merely the first of these elements, namely, the fact of the specific loss or injury sustained, although some judges (Chief Justice Shaw in *Com.* v. *Webster*, 5 Cush. [Mass.] 295, and Chief Justice Church in *People* v. *Bennett*, 49 N. Y. 137, among others) have held that it also includes the second element. I do not find any general rule laid down by the decisions of this court. Language is employed in *People* v. *Hall*, 48 Mich. 482, 485, which indicates that in cases of homicide the corpus delicti involves the death and, also, its character—whether probably caused by someone other than the deceased. See, also, *People* v. *Aikin*, 66 Mich. 460, 472–474; *People* v. *Parmelee*, 112 Mich. 291, 294, 295. The rule that the corpus delicti must be proved by some evidence other than the confession of the accused,—that the confession must be corroborated,—is recognized in *People* v. *Lambert*, 5 Mich. 349, 366; *People* v. *Isham*, 109 Mich. 72; *People* v. *Hawksley*, 82 Mich. 71, 73, 74; *People* v. *Kemp*, 76 Mich. 410, 416; *People* v. *Hess*, 85 Mich. 128, 132, but without determining, in either case, except perhaps inferentially, what constituted the corpus delicti. In some cases, the idea has been expressed that the nature of the offense charged was such that no proof of the corpus delicti could be made as of a separate element of the offense. Such are the cases of *People* v.

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Swetland, 77 Mich. 53, 63; *People* v. *McGarry*, 136 Mich. 316, 324. In *People* v. *Swetland*, it was said:

"There are some cases where the corpus delicti—generally in homicide—is clearly separated and distinct from the question as to who committed the offense, if any is found to have been committed. In such cases the evidence to establish the corpus deliciti must first be given, before acts or admissions of the accused can be put in evidence. But the present case is one where the body of the offense—the uttering of a forged instrument, knowing it to be false—is so intimately connected with the question whether or not the respondent is guilty of the crime, that there can be no such separation. The corpus delicti in this case depends entirely for its existence upon the acts and intent of the respondent, so that her acts and admissions, if admissible at all, were admissible at any stage of the proceedings upon the trial."

For the purposes of the present case, it may be conceded that it was necessary that the confession of respondent should be corroborated as to the corpus delicti. Whether we consider only the first or the first and second elements, as stated, as constituting the corpus delicti, there is, in this case, evidence corroborating the facts stated by respondent in his confession. I use the term corroborate as meaning not merely tending to produce confidence in the truth of the confession, but as referring to facts which concern the corpus delicti. This is the legally correct meaning. 3 Wigmore on Evidence, § 2071. There is evidence undisputed—indeed corroborated by respondent—that he applied to Mr. Rice, the keeper of the hotel, to cash the check, that the check was cashed and respondent received the money. The check was forwarded in the usual course of business to New York and was returned unpaid. It has not been paid and Mr. Rice has never received his money. Before the check was cashed, and as an inducement, respondent, who was at the hotel with a woman not his wife, and owed the proprietor for entertainment, stated that they were going to Muskegon for three or four days and would then return to the hotel, and that mean-

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time Mr. Rice could find out whether or not the check was good; that he would leave a big trunk and a typewriter in it. He left the trunk but no typewriter. He did not return to the hotel but was arrested in May, at Wheaton, Illinois, where he was known as H. H. Straub. He told Mr. Rice that he had been with a certain firm or institution in New York for ten years, had worked from a window washer up, and that the house always sent such checks to their traveling men. He said that Cameron, the drawer of the check, was a member of the firm. A portion of his confession, according to the testimony, was that a man named Cameron drew the check, respondent was to get it cashed, and they were to "split" the money, and did divide it; that Cameron was more to blame than he (respondent) was; that Cameron "told me that he knew a way to get a little easy money;" that he used an assumed name at Wheaton because afraid he might be arrested, and intended to straighten up this matter when he got to work. There was more to the confession than is here stated, some of it favorable to respondent. But it cannot be said that such portions of it as relate to the corpus delicti are not corroborated by other evidence.

During the trial the prosecuting attorney, over objection, obtained leave of the court to indorse upon the information the name of a witness who was thereupon called, sworn, and examined. The testimony of this witness, or that of some other person connected with the bank which forwarded the check for collection, was necessary if the fact was to be proved. On a motion made previous to the trial to discharge the respondent, the subject was adverted to in such a manner that it is apparent the prosecuting attorney must have known he would probably need the witness at the trial. Counsel for respondent, before learning the nature of the testimony to be elicited from the new witness, stated that he would need time to send to New York to find out in regard to the check. Upon learning that it was proposed to prove only that the check went through the bank, was sent on for collection and re-

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turned unpaid, he said his position was that the testimony would be incompetent, irrelevant, and immaterial. It is stated in the brief for respondent that a continuance of the case was asked for and was denied. The record which is referred to does not support this statement. The right to further time was asserted, as has been stated, but no motion for time was made, and the necessary inference from the record is that the trial judge did not suppose that a continuance was desired.

Error is assigned upon a statement made, in argument, by the prosecuting attorney, to the effect that respondent was committing adultery every day. The remark was excepted to. The point made seems to be that there was no proof that either the respondent or the woman he was traveling with was married. But they were registered as man and wife and respondent testified they were not married. The gist of the argument was, not that the relations were such as the word used defines, but that they were immoral, affecting the credibility of respondent. We should not reverse the conviction upon this ground.

A number of errors are assigned upon the charge as given and upon refusal to charge as requested. They have been examined and the charge as given has been carefully read without our being able to say that any reversible error was committed.

Judgment is affirmed.

HOOKER, MOORE, CARPENTER, and MCALVAY, JJ., concurred.

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RUTTLE *v.* WHAT CHEER COAL MINING CO.

1. CORPORATIONS — CONTRACTS — PROMOTERS — VALIDITY — STATUTORY PROVISIONS.

   Whether, under section 6995, 2 Comp. Laws, a contract made by the organizer and principal stockholder of a corporation, prior to the filing of the articles of association and payment of the franchise fee, will bind the corporation, is immaterial in a case in which the corporate organization as actually executed was a mere cover for the organizer, under protection of which it was designed he should individually conduct the business, and he recognized the contract after incorporation and agreed to carry it out.

2. SAME — CONTRACTS — REPRESENTATION BY OFFICERS — LIABILITY OF CORPORATION.

   Where the directors of a corporation, who comprised the entire body of its stockholders, permitted the principal stockholder, who held the offices of president, treasurer, and general manager, to exercise all of their functions and to assume the entire control and management of the corporate affairs, the corporation, having received the benefit of services performed under contract with him, is as much bound as though it had itself formally contracted for the services.

3. WORK AND LABOR — ACTION — IMPLIED CONTRACT — EXTENT OF SERVICES.

   In an action against a corporation for the value of services performed during a certain period, the fact that plaintiff was employed by another corporation during the same period and received an annual salary therefor, will not prevent his recovery, where his employer is not objecting and he testifies that he performed all the services required of him by his employer, and that the general manager authorized his employment by defendant, though the principal stockholder of both companies claims that the original contract of employment was that plaintiff "was to do anything either for me or the company or the W. company that I might ask him, without other compensation."

4. CORPORATIONS — OFFICERS — COMPENSATION — IMPLIED CONTRACT.

   In an action against a corporation for the value of services

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performed, a claim that because plaintiff was a stockholder, secretary and a director of defendant the law presumes, in the absence of an express contract, that his services were gratuitous, and there could be no recovery on an implied contract, is not tenable, where plaintiff was merely a nominal stockholder and received no compensation as an officer.

5. SAME—SERVICES—VALUE—EVIDENCE—SUFFICIENCY.
Where, in an action against a corporation for the value of services performed in superintending defendant's operations, plaintiff testified that the services were worth $5,000, stated their character, and in a general way what he did, and was cross-examined at length, and the services were of such a character that it would be difficult to place a value upon the several items, there was sufficient evidence of their value to go to the jury.

6. WORK AND LABOR—ACTION—EVIDENCE—VALUE.
Where, in an action against a corporation for the reasonable value of services performed as superintendent, it appears that plaintiff was also employed and received an annual salary from another corporation, and has brought suit against the principal stockholder of both corporations for still other services, the character and extent of the services rendered to the other two employers is a material inquiry, and a very wide latitude on cross-examination is permissible.

7. SAME—EVIDENCE—ADMISSIBILITY.
In an action against a corporation for the reasonable value of services performed, evidence as to the price at which plaintiff resold to defendant's principal stockholder certain stock in another corporation, that he received no benefit from its increase in value while he held it, and the price at which a third person transferred the stock to the principal stockholder, is immaterial, and its admission prejudicial.

Error to Bay; Sharpe, J., presiding. Submitted May 11, 1908. (Docket No. 35.) Decided June 27, 1908.

Assumpsit by Charles S. Ruttle against the What Cheer Coal Mining Company for services rendered. There was judgment for plaintiff, and defendant brings error. Reversed.

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Morris L. Courtright (*DeVere Hall*, of counsel), for appellant.

Weadock & Duffy (*T. F. Shepard*, of counsel), for appellee.

BLAIR, J. Plaintiff sued defendant on the common counts in assumpsit to recover for services alleged to have been performed in its behalf, and filed the following bill of particulars:

"1904, July 23, to 1905, July 17.

"To personal services in and in connection with making and looking after contracts and supervising the construction of railroad grade and railroad bridges.

"To services in and in connection with and looking after contracts for the construction of building, including tipple, engine house, boiler house and other buildings.

"To services generally in connection with and in the construction and development of the What Cheer Coal Mining Company's plant and property and the handling of all business matters connected therewith and with the completion of its plant and facilities for operating as a coal mining proposition, including railroad facilities and marketing the product of the company's mine....$5,000.

"Interest on the above at 5 per cent. to date of judgment."

In April, 1901, the plaintiff was employed by the Wenona Coal Mining Company, a corporation composed of Mr. E. B. Foss, Mr. Jackson, Mr. Norris, and Mr. Conway, as stockholders. The capital stock was $100,000, of which Mr. Foss owned one-third, Mr. Norris one-third, and Messrs. Jackson and Conway, together, one-third. Mr. Norris was president, Mr. Jackson, vice-president, Mr. Conway secretary, and Mr. Foss treasurer and general manager.

Mr. Foss testified:

"The management of the Wenona Coal & Mining Company was entirely with me, but I always consulted more or less with Mr. Norris. Mr. Jackson did not give it much attention."

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That he employed plaintiff at a salary of $1,400 a year:

"The substance of the conversation was that he would enter my employ—my employ and that of the Wenona Coal Mining Company at a salary of $1,400 per year; that he was to do anything in the coal line, either for me or the company or the Wenona Coal Mining Company, that I might ask him to do, without other compensation."

Plaintiff testified that his employment was in behalf of the corporation only, and was to look after the business in a general way under the direction of Mr. Foss.

In May, 1902, Mr. Foss bought the Jackson stock and transferred $5,000 of it to plaintiff, taking his note, holding the stock as collateral, to be paid for out of dividends, plaintiff paying the renewal discounts. Plaintiff was elected secretary, and in February, 1903, his salary was raised to $2,000. Mr. Foss was the owner of leasehold interests in certain coal lands in Bay and Saginaw counties, and plaintiff testified:

"Prior to the organization of the What Cheer Coal Mining Company I was associated with the property that afterwards came into possession of the company. My connection with the property commenced in June, 1902. Mr. Foss was also connected with this property, and brought it to my attention, and from that time on I was in a way connected with it. * * * Mr. Foss and I had an arrangement relative to the work; the What Cheer Coal Mining Company articles of incorporation are dated July 23, 1904, and in the arrangement I had with Mr. Foss I was to be a stockholder in that company. * * *

"Mr. Foss had the articles prepared and I signed them and a few minutes after they were signed on the same day, in Mr. Foss' office, which was also the office of the Wenona Coal Mining Company, I had a conversation with Mr. Foss. * * *

"I called Mr. Foss' attention to the fact that there was but one share of stock set opposite my name, and told him that was not according to our agreement or understanding, and he says, 'Never mind, Mr. Ruttle, I have done that for a special reason,' giving the reason. * * * And he says, 'that matter will be fixed up later, and you will be taken care of all right. Don't worry about that, it is all right.'

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"*Q.* At that time what was said about the future work of the What Cheer Coal Mining Company as to what should be— * * *

"*A.* I was to look after their work.

"*Q.* What work were you to look after?

"*A.* Everything in general.

"*Q.* What was said with reference to your looking after the work, and with reference to the work that had been done before between you and Mr. Foss? * * *

"*A.* Mr. Foss being general manager, he says, 'Go ahead, Mr. Ruttle, and we will push the thing along under the new organization, the What Cheer Coal Company,' and that I was to take the general supervision of everything. Mr. Foss was general manager, president and treasurer of the What Cheer Company. Walter I. Foss was vice-president, and I was secretary. At the time the corporation was formed, the company had, as near as I can recollect, 960 acres of coal lands tested up. Some of these lands were owned previously by Mr. Foss. The others were covered by coal leases."

The articles of association of defendant were signed July 23d, 1904, but were not filed with the county clerk until August 16th following. The capital stock of $100,000 was divided into 4,000 shares, of which Mr. E. B. Foss subscribed for 3,998 shares, Mr. W. I. Foss, his son, for one share, and plaintiff, for one share. Plaintiff testified as to the agreement that he should have stock in defendant company:

"*Q.* Was the amount fixed?

"*A.* The amount was set previous to that, it was fixed previous to that time.

"*Q.* At how much?

"*A.* At from ten to fifteen thousand dollars.

"*Q.* That is the proposition you refer to?

"*A.* Yes, sir.

"*Q.* As a gift outright?

"*A.* That was the proposition.

"*Q.* That is, you were not to pay anything for it?

"*A.* I was to have that for my services at the time the What Cheer Company was organized and for my services afterwards I was to be compensated.

"*Q.* But that was the proposition that you have referred to at times?

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"*A.* Yes, sir.

"*Q.* And that was the only one?

"*A.* That was the only one. Mr. Foss represented the defendant in all talks about any proposition with me, and the talk was before the company was formed. No recorded action was ever taken relating to my claim. * * *

"*Q.* Was the talk as to the stock, that is, the understanding as to the stock, a part of the understanding as to the compensation that you speak of also?

"*A.* The stock I expected I would get at the time the company was organized, the compensation would be after.

"*Q.* I understand, but was it your claim that the stock was also a statement of the compensation?

"*A.* It was up to that time.

"*Q.* Up to what date?

"*A.* Up to the organization of the company.

"*Q.* After that do you claim that your stock that you should have received is a part of the compensation for your work which you did?

"*A.* No, sir."

Plaintiff testified that he was employed each day by the defendant company and put in "from half to two-thirds of my time."

In July, 1905, plaintiff resigned his office in both companies, sold his stock to Mr. E. B. Foss, and soon afterwards commenced this suit. No salary was fixed for any of the officers or directors and none of them drew any down to the time of plaintiff's resignation. Plaintiff recovered a judgment upon verdict of the jury for $2,000, which defendant has removed to this court for review upon writ of error. Counsel for defendant present their argument in support of the assignments of error under seven heads, as follows, viz.:

(1) The claimed contract did not bind defendant.
(2) Employment by Wenona Company precludes recovery.
(3) There could be no recovery on an implied contract.
(4) No competent evidence of the value of plaintiff's services.
(5) Limitation of defendant's proof.
(6) Contract claimed not a divisible one.
(7) General rulings.

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1. Under this head it is argued:

"Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. * * * A single stockholder cannot make a contract for and in the name of the corporation which has any binding force or validity, except by subsequent ratification or adoption by the corporation in the regular manner. * * * Although one person owns a majority of the stock, or all of it, or all but two shares, he does not in consequence thereof acquire the right to act for the corporation, or as the corporation, independently of the directors. 2 Cook on Corporations (5th Ed.), § 709; *Randall* v. *Dudley*, 111 Mich. 437, 439; *Rough* v. *Breitung*, 117 Mich. 48, 55; *In re Moser*, 138 Mich. 302, 313; *Louisville Banking Co.* v. *Eisenman*, 19 L. R. A. 684 (94 Ky. 83); *Rice* v. *Peninsular Club*, 52 Mich. 87."

It is further contended that under section 6995, 2 Comp. Laws, any agreement between plaintiff and Foss prior to the filing of the articles of association and payment of the franchise fee could not bind the corporation. *Wright* v. *Sugar Co.*, 146 Mich. 555; *Hastings Industrial Co.* v. *Moran*, 143 Mich. 679.

The evidence warrants the conclusion, at least, that the corporate organization as actually executed was a mere cover for Mr. E. B. Foss, under the protection of which it was designed that he should individually conduct the business. The property turned over to the corporation all belonged to him, and the affairs of the corporation were controlled and managed by him without even the formal action of a board of directors. Plaintiff and W. I. Foss were mere nominal stockholders for purposes of organization, and, in fact, Mr. E. B. Foss was the corporation.

In the paragraph of Cook on Corporations cited by defendant, the author says, after using the language quoted in the brief:

"There are, however, two exceptions to the rules given above. The first is that corporate action may arise in other ways than by the formal action of its board of directors or meeting of stockholders or of its agents. * * * The second exception is that where a corporation is merely

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a 'dummy,' the court has power to ignore its corporate existence and to hold that the acts of the stockholders are the acts of the corporation itself."

It is unnecessary to determine that, under the circumstances of this case, the contracts of Foss in advance of incorporation would bind the corporation, since, according to plaintiff's testimony, Mr. Foss recognized the alleged agreement after incorporation and promised to carry it out. We are, also, of the opinion that if the jury believed the testimony of plaintiff they would be amply warranted in finding that the corporation after its legal institution ratified and adopted the alleged agreement and, in the absence of an express agreement, knowingly accepted the benefit of plaintiff's services. The directors, who comprised the entire body of stockholders of the corporation, having permitted the president, treasurer and general manager to exercise all of their functions and to assume the entire control and management of the corporate affairs, and having received the benefit of his acts and of plaintiff's services, the legal entity is as much bound as though it had itself formally contracted for the services. 2 Cook on Corporations (5th Ed.), § 707. We do not think that the court erred in refusing to direct a verdict for defendant on this ground.

2. Did the fact that plaintiff's services for the period in question were contracted for by the Wenona Company and a salary paid therefor preclude a recovery from defendant? The Wenona Company is not raising this question and it does not come with good grace from Mr. Foss, who claimed, in substance, that the services of plaintiff were rendered for the defendant under the original agreement with the Wenona Company "that he was to do anything in the coal line either for me or the company or the Wenona Coal Mining Company that I might ask him to do without other compensation." Plaintiff testified that he fully performed all of the services required of him by the Wenona Company and the general manager of the company authorized his employment by

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defendant. We think the court properly refused to direct a verdict for defendant on this ground. *Smith* v. *Railroad Co.*, 102 N. Y. 190; *Wallace* v. *DeYoung*, 98 Ill. 638.

3. It is claimed that because plaintiff was a stockholder, secretary, and director of defendant company, the law presumes, in the absence of an express contract, that his services were gratuitous and there could be no recovery on an implied contract in this case. We do not think that the court would have been justified in instructing the jury, as a matter of law, that, under the circumstances of this case, no agreement to pay for plaintiff's services could be implied. *Dodge* v. *Traction Co.*, 152 Mich. 100.

4. The only evidence offered of the value of plaintiff's services was his own testimony that they were worth $5,000. The plaintiff testified as to the character of his services and, in a general way, what he did, and was cross-examined at length upon the whole subject. As stated by the trial judge in overruling the motion for a new trial, "the services rendered by plaintiff, as testified by him, were of such a character that it would be difficult, if not impossible, to place a value upon the several items of service as they were performed." We agree with the circuit judge that it cannot be said, as a matter of law, that there was no competent evidence upon the subject.

5. Plaintiff testified, somewhat vaguely, that he devoted from one-half to two-thirds of his time to the performance of the services for defendant. At the same time he claimed that he was fully discharging his duties towards the Wenona Company and was also rendering services to Mr. E. B. Foss, individually, for which he had brought suit. The court permitted the defendant to show the fact that plaintiff had sued Foss for alleged services covering the same period, but refused to permit it to show the amount of the claim or the character of the services. In this ruling we think the court was in error. It was admitted that there was no agreement fixing the amount of plaintiff's compensation and that he was only entitled to

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recover what his services were reasonably worth. The time which could be devoted to defendant's service must depend largely upon the extent and character of the services rendered to his other two employers. While the value of plaintiff's services to Foss was not material, we think their character and extent were. And we are of the opinion that where a man claims to be employed by three masters at the same time, as in this case, very wide latitude is permissible on cross-examination, and that defendant's counsel should have been permitted to inquire fully into the details of the claim.

6. This contention is not supported by the testimony.

7. Plaintiff was permitted to answer the following question:

"*Q.* What was the book value of the stock in the Wenona Company at the time you made the sale to Mr. Foss?

"*A.* Approximately 85 per cent. above par, $1.85. I sold the stock to the Wenona Coal Company."

He was then permitted to show that he sold the stock to that company for the amount that had been paid by him with the discount added. He was also permitted to show that on his sale to the Wenona Company he got no benefit of the increase in value of such stock and that during such time he was paying interest at the rate of 6 per cent. per annum.

On cross-examination of Foss by plaintiff's counsel, the following occurred:

"*Q.* When Mr. Jackson retired from the company he simply took out and was paid by you the money which he put in? Objected to as immaterial. Objection overruled and exception taken.

"*A.* That is the case.

"*Q.* Totally without interest?

"*A.* He didn't get any interest.

"*Q.* He never got a cent of dividends before he sold, out of his stock?

"*A.* I don't think he did."

The objections to these questions should have been sus-

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tained. The testimony elicited was immaterial and obviously prejudicial to defendant.

For the errors above pointed out, the judgment is reversed, and a new trial granted.

GRANT, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

BROAS *v.* BROAS.

1. WILLS — CONSTRUCTION — ESTATES DEVISED — VESTED REMAINDER.

   A will leaving all testator's property to his widow for life, with power to make such arrangements with the children as to having their shares before her death as she might deem best, and to his four named children, subject to the life interest, to be divided among them after her death share and share alike, creates vested estates in remainder in common upon testator's death in favor of the four children.

2. EXECUTORS AND ADMINISTRATORS — DISTRIBUTION OF ESTATE — INDEBTEDNESS OF HEIR.

   The interest of an heir in the real estate of his ancestor is not chargeable with his indebtedness to the estate.

3. STATUTE OF FRAUDS — PAROL AGREEMENT — REAL PROPERTY — VESTED INTEREST.

   An oral agreement by an heir indebted to his ancestor not to claim a share of the realty of the estate cannot affect a vested interest in the land.

Error to Ionia; Davis, J. Submitted May 12, 1908. (Docket No. 63.) Decided June 27, 1908.

J. Just Broas, Isabel Mann, and Catherine Hill appealed from an order of final distribution of the estate of

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Levi Broas, deceased. There was judgment sustaining the order of the probate court, and appellants bring error. Affirmed.

John C. Weadock (*Scully & Davis*, of counsel), for appellants.

Elmer S. Avery (*Rollin H. Person*, of counsel), for appellee.

HOOKER, J. The defendant, Charles Broas, and his brother, J. Just Broas, and sisters, Isabel Mann and Catherine Hill, were made devisees in common by the will of their father, of estates in remainder in fee of the land in dispute and the same were assigned and the land partitioned by the probate court. On appeal to the circuit court, the decree was affirmed, and the cause is now before us on appeal.

The crucial question in the case is whether a vested interest in remainder passed to the remaindermen upon the death of the testator. This depends upon the construction to be given to the second and third paragraphs of the will, viz.:

"*Second.* I give, devise and bequeath to my good wife, Ruth Ann Broas, all my real and personal property of every kind and nature to have and to hold during her natural life and no longer. It being my wish and will that she have exclusive control and use of the property while she lives, that she shall be at full liberty and have my consent to make any arrangements she may deem best with our children or either of them regarding their or either of their shares or share of the property so as to let any or all of the children have their part of the property before her death, but any division of the property before her death is to be entirely at her option.

"*Third.* I give and devise to my children Catherine Hill, Charles Broas, Isabel Mann and J. Just Broas, all my real and personal property subject to the life interest therein herein given to their mother to be divided among them after her death share and share alike."

The provisions quoted should be construed as creating

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vested estates in remainder in common upon testator's death, in the four children of Levi Broas. *Hoxie* v. *Hoxie*, 7 Paige (N. Y.), 187; *Converse* v. *Kellogg*, 7 Barb. (N. Y.) 590; *Tayloe* v. *Mosher*, 29 Md. 443; *Tatem* v. *Tatem*, 1 Miles (Pa.), 309; *Lowe* v. *Barnett*, 38 Miss. 329; *Taveau* v. *Ball*, 1 McCord, Eq. (S. C.) 7.

There being a vested interest in Charles Broas, the case falls within the rule of *Marvin* v. *Bowlby*, 142 Mich. 245 (4 L. R. A. [N. S.] 189), and it was not chargeable with his indebtedness to the estate and the appellants' claim cannot be sustained.

Of the alleged parol agreement of Charles Broas not to claim a share of the realty, it is enough to say that it could not affect a vested interest in land.

It is unnecessary to discuss the questions growing out of Wilson's claims as creditor, as the appellants have no interest in them.

The decree is affirmed, with costs.

GRANT, C. J., and BLAIR, MONTGOMERY, and MOORE, JJ., concurred.

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PATTERSON v. BORON.

MUNICIPAL CORPORATIONS—OFFICERS—APPOINTMENT—QUALIFICATIONS—SOLDIERS.

Under section 2990, 1 Comp. Laws, the mayor of a city of the fourth class is charged with the duty of determining whether an applicant for the office of city attorney possesses the necessary qualifications, and no law authorizes a court to review his determination that an applicant is not qualified, notwithstanding the applicant claims a preferment under section 1, Act No. 329, Pub. Acts 1907, by virtue of being an honorably discharged Union soldier, having served in the late Rebellion.

Certiorari to Clinton; Searl, J. Submitted June 16, 1908. (Calendar No. 22,895.) Decided June 27, 1908.

Mandamus by Henry J. Patterson to compel Eddie Boron, mayor of the city of St. Johns, to appoint relator to the office of city attorney under Act No. 329, Pub. Acts 1907. There was an order denying the writ, and relator brings certiorari. Affirmed.

Henry J. Patterson, in pro. per.

E. J. Moinet (*J. Earl Brown*, of counsel), for respondent.

PER CURIAM. This is a mandamus proceeding determined adversely to relator in the circuit court. It is before us for review. Relator is an honorably discharged Union soldier, having served in the late Rebellion. He is also a regular practicing attorney and a resident of the city of St. Johns. He seeks by this proceeding to compel respondent to appoint him attorney of said city. He bases his right to said appointment on section 1 of Act No. 329 of the Public Acts of 1907, which reads as follows:

"In every public department, and all public depart-

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ments in all municipal corporations, and upon the public works of the State of Michigan, honorably discharged Union soldiers, sailors and marines of the late Rebellion, and the soldiers, sailors and marines of the late Spanish-American war shall be preferred for appointment and employment; age, loss of limb or other physical impairment which does not, in fact, incapacitate, shall not be deemed to disqualify them: *Provided, however,* That the applicant shall be of good moral character and shall have been a resident of the State for at least two years and of the county in which the office or position is located for at least one year, and possesses other requisite qualifications."

Respondent refuses to make the appointment upon the ground that, according to his "best judgment, relator * * * is not * * * competent to perform the duties of the office of city attorney for said city of St. Johns, and that in the judgment of respondent * * * relator does not possess the requisite qualifications for said office."

It will be observed that according to the section of Act No. 329 above quoted, discharged Union soldiers are not entitled to an appointment unless they possess the other requisite qualifications. The respondent has determined that relator lacked those requisite qualifications. Had he a right to make that determination? St. Johns is a city of the fourth class. The law regulating the appointment of city attorney is found in section 2990, 1 Comp. Laws. It reads:

"The following officers shall be appointed by the mayor, by and with the consent of the council, viz., a city attorney. * * *"

This right to appoint imposed on respondent the duty of determining that his appointee possessed the requisite qualifications for the office. He would have been faithless to that duty had he appointed an applicant whom he deemed disqualified. The law therefore made it his duty to determine whether relator—an applicant for the office—possessed the requisite qualifications, and no law authorizes a court to review his determination that relator lacked such qualifications. It must therefore be held that rela-

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tor is not entitled to the appointment in question because it has been authoritatively determined that he does not possess the requisite qualifications therefor.

It should not be inferred from this opinion that we decide that section 1 of Act No. 329 of the Public Acts of 1907, above quoted, has any application to the office of city attorney or to similar offices. The ground upon which our judgment rests makes it unnecessary for us to consider that question and we do not consider it.

The learned trial judge correctly decided the motion, and his order is affirmed.

BUXTON v. AINSWORTH.

1. EVIDENCE—OPINIONS—CONDITION OF HIGHWAY — IRRESPONSIVE ANSWER.

   In an action for damages resulting from an injury suffered in a collision between vehicles on a highway, a witness who had been called to the place of the collision by plaintiff and had the place pointed out to him was asked in effect whether there was room for defendant to pass. *Held*, that if the question was objectionable as calling for witness' opinion on a question of fact, the answer was not so, where he stated that there was no object that would keep the vehicle from passing, that it was not a good road (a conclusion in defendant's favor), and that if the location of plaintiff's buggy was as pointed out to him, there would have been ample room, namely, nine feet of good road.

2. DAMAGES — PERSONAL INJURIES — EVIDENCE — ADMISSIBILITY — MEDICAL ATTENTION.

   In an action for damages resulting from personal injuries, it may be shown by the attending physician that he advised complete rest, that medication was not required, and that

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frequent visits would not be necessary, as explaining why, the injury being serious, the calls of the physician were infrequent.

3. SAME—PLAINTIFF'S INDUSTRY.
In an action for personal injuries, plaintiff's habits of industry may be shown.

4. WITNESSES—CROSS-EXAMINATION—SHOWING BIAS.
In an action for damages for a personal injury, defendant's father, who was a witness for defendant, was properly asked, on cross-examination, as showing his interest in the litigation, whether he did not claim to own everything defendant had, whether he knew anything about defendant having deeded all his land to him, and whether, although he had replevined all the personal property in the possession of defendant and levied upon under the execution for costs in the original case, he had given such property in for taxation.

5. EVIDENCE—PAROL EVIDENCE—CONVEYANCE OF LAND—HARMLESS ERROR.
A question to defendant's father whether he knew anything about defendant deeding his land to witness just before judgment was rendered at a previous trial of the case, if objectionable as an attempt to show by parol a conveyance of land, is harmless, where the witness had just stated that he claimed to own everything defendant had.

6. HIGHWAYS—COLLISION OF VEHICLES—ACTION—INSTRUCTIONS.
In an action for damages resulting from an injury suffered in a collision between vehicles on a highway, an instruction that might be open to the criticism that it failed to put upon plaintiff the duty of maintaining any outlook to discover approaching vehicles is not inappropriate where it appears that plaintiff saw defendant coming when some distance away and the jury could not have misapprehended plaintiff's theory in that regard.

7. TRIAL—INSTRUCTIONS—REFUSAL—PROPRIETY.
No error appears from the refusal of instructions which, so far as competent, are covered by the general charge.

8. HIGHWAYS—LAW OF THE ROAD—MEETING VEHICLES—NEGLIGENCE.
Where defendant was traveling at night in a track on the right hand side of the wrought portion of the highway, and met plaintiff who was traveling in the same track, whether defendant exercised ordinary care in voluntarily turning his horse to the left to avoid a collision was at most a question

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for the jury, and an instruction stating that in such case there was not a want of ordinary care was properly refused.

9. TRIAL—INSTRUCTIONS — CONSTRUCTION — CHARGE AS A WHOLE. An instruction in a personal injury case stating that plaintiff might recover for pain, suffering, and mortification experienced, and, in case the injury was permanent, that to be experienced, "also such further damages as will compensate plaintiff for his loss of capacity and prospects of life," *held*, not objectionable as permitting recovery for loss of earning capacity not proved, where the jury were elsewhere instructed that there could be no recovery for time lost or for diminished earning capacity, more especially as the amount of the verdict did not indicate misapprehension as to the elements of recovery.

Error to Ionia; Miner, J., presiding. Submitted June 3, 1908. (Docket No. 5.) Decided June 27, 1908.

Case by James Buxton against Thomas Ainsworth for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

R. A. Hawley, for appellant.

Morse & Locke, for appellee.

MONTGOMERY, J. This is an action to recover damages resulting from an injury suffered in a collision between vehicles driven by plaintiff and defendant respectively. The case has once had the attention of this court, and is reported at length in 138 Mich. 532, where the facts are fully stated. The facts appearing upon the second trial do not differ very materially from those given in the reported case, and except as noted in the discussion of the several exceptions taken, it will not be necessary to advert to the testimony. There are a large number of assignments of error, some of which are not discussed. We shall deal with such as we deem worthy of notice in the order adopted by counsel.

The first assignment of error is to permitting the following question to be put to a witness for the plaintiff who

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had been called to the place of collision and the place where the collision occurred pointed out to him:

"At the place pointed out to you, where the collision took place, a vehicle coming from the south to that point, could they have passed around on the east side providing that a vehicle was on the traveled track on the east side of the highway that was there at that time in front of that place?"

The answer to this question was:

"Yes, there was no object that would have detained or kept the vehicle from passing. Of course, it wasn't a good road. If the location of Buxton's buggy was as pointed out to me, there would have been ample room, nine feet of good road."

It is objected that this question called for the opinion and conclusion of the witness upon the point as to whether there was room for the defendant to pass in the highway, and it is said that it was a bare proposition of fact upon which expert or opinion testimony was inadmissible. Whatever the question may have been deemed to have called for, the answer is not objectionable as being in the nature of opinion evidence. The witness states three things: *First*, that there was no object that would detain or keep the vehicle from passing; *second*, a conclusion in defendant's favor—it was not a good road; *third*, that if the location of Buxton's buggy was as pointed out to him, there would have been ample room, namely, nine feet of good road.

The next objection is to the testimony of the doctor who had attended the plaintiff. The question was:

"When you were taking care of him what did you consider was the best treatment for him, what did you advise?"

The witness answered that he advised complete rest and to keep the plaintiff in bed; that he did not think plaintiff required drugs or that drugs in and of themselves would effect a cure; that it would be unnecessary to have frequent visits from him, but that he could be called when-

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ever necessary. It is said that the real purpose of this question was to furnish the jury an attempted excuse for the slight medical treatment furnished the plaintiff for such a serious injury as is claimed in this case—the doctor having been called but 17 times and having prescribed about 20 times. A sufficient justification for receiving testimony for that purpose is that in our opinion it is precisely what the testimony is competent for. It might have been made a subject of argument that this plaintiff was slightly injured if he required only 17 calls from a physician. It was entirely competent to meet any such argument, which is implied in the present brief, by showing the reason why, in the opinion of the medical attendant, such calls were not essential, a reason not inconsistent with the fact of serious injuries.

The third assignment of error relates to testimony offered as to plaintiff's habits of industry. We think this testimony was competent. The case of *MacQuisten* v. *Railway Co.*, 150 Mich. 332, is cited to sustain defendant's contention that it was incompetent. That was a case under the death act, and it was clearly indicated that the opinion was not intended to extend to other cases. But in the later case of *Shall* v. *Railway*, 152 Mich. 463, we have held testimony of this character competent in such a case as the present.

The fourth, fifth, sixth, and seventh assignments of error relate to questions put to the defendant's witness, Robert Ainsworth, who was defendant's father, on the cross-examination, which were put with the purpose of showing the interest Robert Ainsworth had in the result of the litigation. The questions were as to whether he didn't claim to own everything that Thomas had, and whether he knew anything about Thomas having deeded all his land to him, and whether, although he had replevined all the personal property in the possession of Thomas and levied upon under the execution for costs in the original case, he had given such property in for taxation. We think that all the questions were in the discre-

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tion of the trial court. The objection to the following question:

"Now, did you know anything about your son Thomas on the 29th of June, 1903, just before judgment was entered in this case, deeding to you all of the land held in his name at that time?"

that it was an attempt to show by parol a conveyance of land might, if it be considered that the question was directed to showing the fact of the conveyance rather than the knowledge of the witness of the fact, be open to some question were it not for the fact that the witness had just testified that he claimed, at the moment when he was on the stand, that he owned everything that defendant, Thomas, had, which in our judgment renders the other question immaterial, and if there was error, it was not prejudicial.

Error is assigned upon certain portions of the charge of the court. First, the following:

"If the jury should find that the plaintiff was driving in the traveled track and on the approach of the defendant and as soon as he saw him, the plaintiff attempted to turn to the right and was in fact in the act of turning to the right and the defendant did not turn to the right, and defendant was guilty of negligence, thereby causing the collision and the plaintiff would be entitled to recover, as it is the duty of the defendant to seasonably turn to the right as well as for the plaintiff."

It is argued that this instruction contained the vice of failing to put upon the plaintiff the duty of maintaining any outlook to discover approaching vehicles. There would be some force in this criticism if the effort had been made to state abstractly the rule of law defining plaintiff's duty on the highway, or if the claim of plaintiff had been that the defendant appeared suddenly before him so that he hadn't ample time to make the turn. But that is not this case. It appeared on the former trial, and also appeared on this trial, that the plaintiff freely admitted that he saw the defendant coming quite a ways away. It was

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not the theory of the plaintiff, therefore, nor could the jury so have understood it, that the defendant suddenly ran him down. The jury could make no mistake in interpreting this instruction.

The eighth and ninth requests, which were refused, were, so far as they were competent, sufficiently covered by the general instructions of the court.

The defendant's sixteenth request asked an instruction that—

"If the defendant was driving northward on the road in question, in the east traveled track of the road as described in the evidence, and that in the darkness he suddenly came upon plaintiff's vehicle coming southward in or near the same track, and that he voluntarily or involuntarily turned his horse suddenly to the left in order to avoid the danger which thus confronted him, he would not be guilty of negligence or want of ordinary care in so doing."

We think this request was properly refused. It was at most a question for the jury as to whether, suddenly becoming aware of the situation, it was ordinary care to voluntarily turn his horse suddenly to the left.

The defendant submitted two requests to charge upon the subject of loss of time and earning capacity of plaintiff, one of which was:

"There being no evidence in this cause of the value of plaintiff's time lost by reason of the injuries sued for, nor any evidence of how much he could earn before the injury, there is no basis for any money estimate of the value of such time and there can be no recovery for the time lost or for diminished earning capacity on account of such injuries."

This request was given. Another request was preferred stating that there was no basis for any money estimate of plaintiff's future damages on account of the impairment of his earning power, and there could not be any recovery for diminished earning capacity on his part in the future. This was not given. The circuit judge in the course of his instructions stated that plaintiff, if entitled to recover,

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would be entitled to recover reasonable compensation for his fright and shock at the time of the collision, for his pain and suffering—

"For his anxiety and suspense, nervous prostration and sickness occasioned thereby, and for such mental strain and mortification by reason of being obliged to use or depend upon crutches, canes, or other inconveniences for the purpose of locomotion or otherwise, as the jury shall find from the evidence the plaintiff to have experienced in consequence of the collision; and if permanently injured thereby, then such further compensation for bodily and mental pain, suffering, mortification and inconvenience as plaintiff may be obliged to endure hereafter; also such further damages as will compensate plaintiff for his loss of capacity and prospects of life."

It is claimed by the defendant that the jury would understand these instructions as permitting recovery for loss of capacity to earn money. In view of the fact that the court had distinctly charged the jury that the plaintiff could not recover for loss of time or for diminished earning capacity on account of such injuries, we do not think the jury could have been misled by this instruction. If the verdict had given evidence by the amount of it that there was reasonable ground to believe that the jury had misapprehended the instruction, and that defendant had suffered by reason thereof, we should consider this question more serious. But the verdict in this case was $500, an amount which in itself indicates that the jury could not have understood the instruction as warranting an award of damages for decreased capacity of earning money in the future.

We think no error to the prejudice of the defendant is shown on this record.

The judgment is affirmed.

GRANT, C. J., and BLAIR, OSTRANDER, and HOOKER, JJ., concurred.

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PIERCE v. C. H. BIDWELL THRESHER CO.

1. NEGLIGENCE — PERSONAL INJURIES — DEFECTIVE MACHINERY — LIABILITY OF MANUFACTURER.

   In an action against the manufacturer of a threshing machine for injuries to a laboror using the machine in the usual course of business, caused by a concealed defect in the structure of the machine, instructions examined, and *held*, sufficiently favorable to defendant.

2. SAME—CHARACTER OF DEFECT—DANGER TO LIFE OR LIMB.

   Where it was expected that the decking of a threshing machine over the cylinder would be used as a platform upon which operatives would have occasion to go frequently while the machine was in operation, and it was known that the consequence of breaking through would be most serious, the question whether it was imminently dangerous to human life or limb to place such machine on the market with a portion of the boards of the decking supported at one end only by four-penny nails driven upward through boards seven-eighths of an inch thick into maple cleats, not clinched or otherwise fastened, was at least one for the jury, though there was no expert testimony offered as to the dangerous character of the construction.

3. SAME—KNOWLEDGE OF DEFECT.

   The manufacturer having knowledge of the manner of construction and of the uses to which the machine was to be put, the question whether he had a full appreciation of the danger was at least a question for the jury.

4. SAME—DAMAGES—LOSS OF EARNING POWER—EVIDENCE.

   Where, in a personal injury case, there is no testimony offered to show the earning capacity of the plaintiff, nor how much it has been diminished by the injury, it is error to instruct the jury that in awarding damages they may consider to what extent the injury has actually damaged plaintiff in his daily avocation and pursuit of life, and to refuse instructions of a contrary tenor.

Error to Eaton; Smith, J. Submitted June 4, 1908. (Docket No. 32.) Decided June 27, 1908.

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Case by Loren D. Pierce against the C. H. Bidwell Threshing Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Reversed.

Thomas, Cummins & Nichols, for appellant.

Frank A. Dean, Ernest G. Davids, and *Huggett & McPeek*, for appellee.

MONTGOMERY, J. The defendant is engaged in the business of manufacturing and placing upon the market threshing machines. On the 20th of September, 1906, the plaintiff was injured by breaking through the decking and into the cylinder of a machine which had been manufactured by defendant and sold to one Joseph Harned in the summer of 1905. The machine was what is known as a Bidwell bean thresher. The mechanism of this machine consisted in part of a cylinder, with metal frame and teeth, situated near the top and toward the rear of the machine, and which, when the machine was in operation, revolved rapidly and would of course injure any one who came into contact with it. Above this cylinder was a removable decking made of narrow, soft-wood boards running crosswise of the machine, and the ends of which, except as hereinafter stated, rested on the outer frame work of the machine. This piece of decking was three feet, ten and one-half inches long and about three feet wide. The boards were seven-eighths of an inch thick and were matched together with tongue and groove matching. The three forward boards were altogether nine and one-half inches wide. At the forward right-hand corner, an opening was made for an elevator spout by cutting two of the boards entirely and a third one partly off, leaving one inch of the third board running through and resting on the sill. Above these boards about three inches from the point where they were cut off, and extending across them onto the adjoining boards on either side was a cleat, thirteen inches long, three inches wide, and seven-eighths of an inch thick. The

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three boards were nailed to this cleat with four-penny nails driven from the under side. The cleat was of hard maple. The nails were not long enough to go through the maple cleat, nor were they in any manner clinched. There were six of these nails in the three boards, only five of which penetrated the maple cleat. The whole decking was painted inside and out with a priming coat, and the outside was painted with what is called "decking paint." At each end of the platform and between the corners of the piece of decking was a hole, from which an oil pipe led to the cylinder boxes, and it was shown that it was the custom to go upon this deck for the purpose of oiling these cylinder boxes frequently. It also appeared that the elevator spout ran into this opening; that it occasionally clogged, and on such occasions it was necessary to go upon the decking for the purpose of opening it up.

Mr. Harned purchased this machine in 1905, and used it for some five weeks, and had started in to use it in the season of 1906, and on the fifth day it was in use in that year, the plaintiff, while going upon this platform for the purpose of reaching the tool box, stepped upon this portion of the decking supported only by these nails driven from underneath, his foot went through and he received a very serious injury which made it necessary to amputate his foot a few inches above the ankle. This thresher has been manufactured a good many years, and a number of them sold in Eaton county, where this injury occurred.

The plaintiff offered no expert evidence to show that this decking as constructed was dangerous to life and limb, but relied upon the structure itself for such evidence. The defendant offered testimony of the treasurer and sales manager and of its superintendent at the factory who all disclaimed any knowledge that the structure was or was claimed to be dangerous before the injury in question occurred.

Prior to the injury of the plaintiff, he had been a farm laborer, working out by the day and month. Since his injury, during the season of 1907, he worked a farm for

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himself. No evidence was introduced as to his earnings either before or after the injury, nor as to his life expectancy.

The circuit judge charged the jury as follows:

"The action in the case is based upon the theory that the manufacturer—I am now giving you the theory of the plaintiff—that the manufacturer or vendor of an article or machine, which he knows when he sells it to be imminently dangerous by reason of defects therein, concealed or not readily discoverable, to the life or limbs of anyone who shall use it for the purpose for which it was made and intended, will be liable to any stranger to the contract of sale, for an injury which he may sustain as a consequence of such defect, and while he is legally and without fault on his part applying such articles or machine to its proper and intended use. This claim has been made to rest upon the underlying principle of the law of negligence, that it is the duty of everyone to so act himself and to use his property as to do no unnecessary damage to his neighbor. Actions for negligence are actions for a breach of duty; they are clearly distinguishable from actions on contracts, which are for breaches of agreements. The limits of liability for negligence are consequently not the limits of liability for breach of contract. And so you are instructed that in your investigation and determination of this case you should be guided by the well-established rule that one who sells or delivers an article which he knows to be imminently dangerous to life or limb, to another, without notice of its qualities in this particular, is liable to any person who, without fault on his part, suffers an injury therefrom, which might have been reasonably anticipated, whether there were any contractual relations between the parties or not.

"You are instructed that, if one engaged in the business of manufacturing goods not ordinarily of a dangerous nature to be put upon the market for sale and ultimate use, so negligently constructs an article that by reason of such negligence it will obviously endanger the life or limb of any one who may use it, and if the manufacturer, knowing of such defect, and knowing that the same is so concealed that it is not likely to be discovered, puts the article in his stock for sale, and sells and disposes of the same to anyone without notice of such dangerous condition, he is liable for injuries caused by such negligence, to any-

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one into whose hands the dangerous article or implement may come for use in the usual course of business, or who may be employed in the proper and lawful use or operation of any such dangerous article or implement, without fault on his part, even though there may be no contractual relations between such injured party and the manufacturer.

"The gist of this case, gentlemen, is really in the instruction that I am now about to give you.

"You are instructed that should you find from the evidence in this case that the decking of the machine in question contained the defect alleged in the declaration, and which defect rendered said machine dangerous to the life or limb of those who might be operating it; that this defective and dangerous condition was so concealed by defendant that it could not be readily discovered by those operating or working on the machine; and if you further find from the evidence in the case that the machine in question was, as constructed by defendant, imminently dangerous to the life and limb of anyone who should operate the same; that the defendant knew of this defective and dangerous condition when it sold and supplied the machine to the employer of the plaintiff and knowingly failed to disclose this condition and that plaintiff sustained the injury shown through and in consequence of this defect without fault on his part, your verdict should be for the plaintiff, and you should award him such damages as you shall deem him justly entitled to under the instructions I will give you regarding the measure of damages."

There can be no doubt that these instructions are sufficiently favorable to the defendant if there was testimony which justified the finding of the jury of the facts requisite for a recovery under the instructions given. See note to *Griffin* v. *Jackson Light Co.*, 92 Am. St. Rep. 552 (128 Mich. 653, 55 L. R. A. 318); *Bright* v. *Barnett & Record Co.*, 88 Wis. 299 (26 L. R. A. 524); *Schubert* v. *J. R. Clark Co.*, 15 L. R. A. 818 (49 Minn. 331); *Huset* v. *Machine Co.*, 61 L. R. A. 303 (120 Fed. 865); *O'Neill* v. *James*, 138 Mich. 567 (68 L. R. A. 342). In fact it is not contended by the defendant that the rule stated by the circuit judge was improper. But it is contended that the verdict should not be sustained for the reason that

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there was no evidence justifying a finding of the jury either that the structure complained of was imminently dangerous to human life or limb, or that the defendant knew and understood when it made and sold the machine that because of such construction it was imminently dangerous to human life and limb.

We think it was entirely proper to submit to the jury the question of whether this construction was such as to make the machine imminently dangerous to life or limb. It is not questioned that it was expected that this decking would be used as a platform upon which the employés engaged in operating this machine would have occasion to go frequently while the machine was in operation. Nor is it questioned that the consequences of breaking through this decking would most obviously be serious. The question then presented is whether it was necessary to call expert testimony of mechanics to enlighten the jury upon the question of whether driving four-penny nails upward into a cleat would be imminently likely to result in letting a man down into the cylinder who stepped his weight upon these boards supported in no other manner. We think it altogether clear that this question was at least a question for the jury. All that stood between the plaintiff and the most serious injury was the friction which held this nail in the hole which it had created by being driven into the wood from underneath. It does not need expert testimony to demonstrate such a simple rule in physics. There could be but one result of placing any great weight upon this place, and the jury were amply justified in finding that the structure was imminently dangerous. There was nothing to indicate to the workman just how this was fastened, even had the duty rested upon him of making an inspection. It was being used for the purpose indicated, and he had the right to rely upon the apparent invitation to use it in that manner.

But it is urged that even if this structure was imminently dangerous, it does not follow that the defendant

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had knowledge of or appreciation of the dangerous character of the structure.

In saying that there is sufficient in the structure itself to justify a finding by the jury that the same was inherently imminently dangerous to life and limb, it is implied that it was such to the knowledge of the defendant. The defendant was the manufacturer. It had knowledge of the uses to which this machine was to be subjected. It had knowledge of the manner of construction, and even if a full appreciation of the danger by the defendant was essential to make out the plaintiff's case, it would at least be a question for the jury as to whether defendant had such appreciation at the time this machine was constructed and placed upon the market. The language of the court, in *Schubert* v. *J. R. Clark Co.*, supra, in dealing with a similar question as it related to a ladder, defects in which were concealed by paint, is peculiarly appropriate. The court say:

"The defendant is to be deemed to have known the fact alleged,—that the dangerous defects were concealed by the application of oil, paint, and varnish,—although we do not understand that this was applied for the purpose of concealing such defects. It would seem that after that was done the defendant could not have distinguished this ladder from any other of its manufactured goods of a like kind. If, then, the defendant did not know, and could not have discovered, at the time of delivering this ladder to the plaintiff, that it was defective, there could be no wrong in not then disclosing the existence of defects in this particular article, which were neither known nor discoverable; and the question of the defendant's liability reaches back to the time of manufacturing and putting into its stock of goods for sale an article then known to be dangerously defective, the defects being concealed, and not likely to be discovered, either by any intermediate purchaser standing between the defendant and the person who might procure the ladder for use, or by the latter person. We shall assume, then, that there was no wrongful conduct when the ladder was delivered, but only, if at all, when it was manufactured, and put in the defendant's general stock for sale. In this view of the case, the

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wrongful conduct of the defendant and the injury resulting therefrom would be somewhat more widely separated in time and in the order of events than in the case as we have heretofore assumed it to have been; but it would not change their real relation as cause and effect, nor so qualify that relation that the law would regard the injury as being so remote from the wrong that for that reason responsibility should cease. When the defendant manufactured and put the dangerously faulty article in its stock for sale, it is to be deemed to have anticipated that, in the ordinary course of events, it would come to the hands of a purchaser, either directly from the defendant or from some intermediate dealer, for actual use, and with the consequences which actually were suffered."

We think there was no error in submitting the question to the jury in the form in which it was put.

The defendant requested the court to charge the jury as follows:

"There is no evidence in this case as to any loss of earning capacity on the part of plaintiff. You are not permitted to guess at such loss, and therefore can award nothing in the way of damages for loss of earning capacity.

"There is no evidence in this case as to the probable duration of plaintiff's life, hence you cannot award any damages for the future loss of plaintiff by reason of his injury."

These requests were refused, and the court charged the jury that in awarding damages they were at liberty to consider to what extent this injury has actually damaged him in his daily avocation and pursuit in life.

We are constrained to hold that in refusing the instructions preferred and in giving the instruction excepted to, there was error. There was no testimony given tending to show what the earning capacity of the plaintiff was nor how much it had been diminished by this injury. The defendant therefore had no opportunity to meet that claim. The jury, acting upon their own judgment, uninstructed by testimony, must have agreed upon some basis to estimate this element of damages. This we think they

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were not authorized in law to do. A case substantially on all fours is that of *Staal* v. *Railroad Co.*, 107 N. Y. 625. See, also, *Britton* v. *Railway Co.*, 90 Mich. 164; *Winter* v. *Railway Co.*, 74 Iowa, 448. The verdict in this case was $6,500. We are not able to say that this error was error without prejudice.

The judgment must be reversed, and a new trial ordered.

GRANT, C. J., and BLAIR, OSTRANDER, and HOOKER, JJ., concurred.

FLEMING v. WHEELER.

REFORMATION OF INSTRUMENTS—DEEDS—RECONVEYANCE BY PURCHASER—CORRECTION OF MISTAKE.

Complainant, a vendor of lands, having accepted a reconveyance by quitclaim deed on defendant purchaser's failure to pay the price, filed his bill to reform the deed for a mistake in the description, and defendant answered, claiming to have acquired certain outstanding tax titles which he ought to be allowed to retain, and alleging his ignorance of the legal effect of the quitclaim as to those titles. Though the written contract of sale imposed no such obligation, the sale and the price were based upon an oral understanding that defendant was to acquire the tax titles. *Held*, that though defendant was not legally bound to purchase the titles for the security of his vendor, it was equitable for him to carry out his oral promise, and having attempted to do so, and accepted a release from his contract on executing the deed, equity did not demand that he be allowed to disregard the settlement.

Appeal from Oceana; Sessions, J. Submitted June 14, 1908. (Docket No. 79.) Decided June 27, 1908.

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Bill by R. Andrew Fleming, trustee, against Morton B. Wheeler and Anne S. Wheeler to correct a description in a deed. From a decree for complainant, defendants appeal. Affirmed.

Nims, Hoyt, Erwin & Vanderwerp, for complainant.

Holmes & Holmes, for defendants.

HOOKER, J. The complainant in this cause is a trustee under certain conveyances to William B. Hale made by the heirs and executor of William M. Ferry, deceased. He has filed the bill to reform a quitclaim deed of several parcels of land, given to him as such trustee, by the defendant, one or more of which descriptions were incorrect in the range, being mistakenly described as follows: viz., S. W. ¼ of N. W. ¼, sec. 2; N. E. ¼ of S. E. ¼ of sec. 3; E. ½ of N. W. ¼, and N. ½ of N. E. ¼ of sec. 9; S. W. ¼ sec. 9; S. E. ¼ of S. E. ¼ of sec. 17; S. ½ of S. E. ¼ of sec. 23; S. W. ¼ of N. E. ¼ of sec. 30, all in township 13 N. of range 16 W. Also the S. W. ¼ of N. W. ¼ sec. 25, in township 13 N. of range 16 West. The bill claims that the land in sections 2, 3, 9, 17, 23 and 30, mutually understood as being the subject of said deed, was in township 13 North of range 15 West, and it prays that defendant be required to execute a proper conveyance to correct said mistake. The testimony is conclusive in support of the allegations of the bill and an affirmance of the decree would be a matter of course, except for the defense set up, which challenges the equity of the relief asked and prays affirmative relief.

These lands were all held by complainant in trust, through the conveyances from the Ferry heirs and executor, and were sold by complainant as such trustee to the defendant by written contract and proper descriptions on May 1, 1905. The contract price was $1,200, and this not being paid when due, the complainant, after futile efforts to obtain payment, wrote the defendant on November 8, 1906, as follows:

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"MUSKEGON, MICH., Nov. 8, 1906.
"M. B. WHEELER,
"Grand Rapids, Mich.

"*Dear Sir:* There is past due upon your land contract of May 1, 1905, $600 and interest at five per cent. from May 1, 1905, less $25 paid by A. D. Nichols (that should be O. D. Nichols). I wish you would adjust this matter without further delay. If you do not propose to pay this amount, I wish you would surrender your land contract.

"Yours truly,
"R. A. FLEMING."

He received this answer:

"GRAND RAPIDS, MICH., Nov. 9, 1906.
"Mr. R. A. FLEMING,
"Muskegon, Michigan.

"*Dear Sir:* Answering yours of the 8th I am not desirous of continuing the land contract that I have with you in my name for myself and associates. If you will be kind enough to make up a reconveyance and send it to me for my signature I will give it my attention promptly."

The correspondence continued as follows:

"MUSKEGON, MICH., Nov. 10, 1906.
"M. B. WHEELER, Esq.,
"1001 Michigan Trust,
"Grand Rapids.

"*Dear Sir:* I have received yours of the 9th inst. Complying therewith I enclose herewith quitclaim deed from yourself and wife to me as trustee covering the descriptions in your land contract dated May 1, 1905, except the southeast quarter of the northeast quarter of section 9, town 13 north of range 15 west, which has been deeded to Obed D. Nichols. Kindly execute the deed and return it to me. I wish you would send me the abstracts of title and tax histories covering these descriptions.

"Yours truly,
"R. A. FLEMING."

"MUSKEGON, MICH., Dec. 1, 1906.
"M. B. WHEELER, Esq.,
"Grand Rapids.

"*Dear Sir:* Complying with yours of November 9th, I wrote you November 10th enclosing a quitclaim deed to be executed by yourself and wife in settlement of your land contract made with me May 1, 1905. Since then I

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have heard nothing from you. What is the cause of your delay?

"Yours truly,
"R. A. FLEMING."

"GRAND RAPIDS, MICH., Dec. 3, 1906.
"Mr. R. A. FLEMING,
"Muskegon, Mich.

"*My dear Mr. Fleming:* In response to yours of the 1st, I have not forwarded you the instrument you desire on account of Mrs. Wheeler's illness. I will have her sign this paper this week some time and send it to you, which I trust will be entirely satisfactory.

"Yours truly,
"M. B. WHEELER."

"GRAND RAPIDS, MICH., January 12, 1907.
"Mr. R. A. FLEMING,
"Muskegon, Mich.

"*Dear Sir:* As requested by you, we are enclosing herewith quitclaim deed dated November 10th, 1906, for descriptions in our land contract of date May 1, 1905, except the southeast quarter of the northeast quarter of section 9, town 13 north, of range 15 west.

"Yours truly,
"M. B. WHEELER."

The deed enclosed was the defective instrument.

Complainant discovered the error in July, 1907, after selling one of the parcels, and asked that the defendant correct it by giving a new deed, which he sent him for that purpose, but it was never executed, hence this suit was begun.

The defense made is that the quitclaim deed was given by Wheeler to carry out the arrangement consented to by him, to surrender his contract for these lands. Mr. Wheeler asserts in his answer that he was the owner of some tax titles and interests to and in, and perhaps some other claims upon, the premises, some acquired before the land contract was made and some afterward; that he was under no obligation to convey these under such arrangement to surrender his contract; that he was informed by complainant that a quitclaim deed was a proper instrument to make in order to accomplish the surrender of the contract, and

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that he was not aware that it would have the effect to divest him of other titles or interests than that held and contracted to him by complainant, and that at the time he made the quitclaim deed he had no knowledge in relation to the titles to the lands described therein, and believed and relied on the statements of complainant, viz., that "a quitclaim deed was the only way by which said contract could be surrendered;" that it would simply convey to complainant the interest acquired by the land contract; that all of the tax interests acquired by defendant before and after the execution of the contract had merged in the complainant's contract, and that they legally belonged to him, and that the defendant had no right to retain them.

The substance of the prayer of the answer is that the quitclaim deed already made be interpreted as covering only the titles and interest obtained from the complainant and be declared void for every other purpose. Apparently there is no other objection to a correction of the description. In the trial court, complainant obtained a decree in accordance with the prayer of the bill and defendant has appealed.

A copy (stenographic doubtless) of an oral opinion given by the learned circuit judge states that two options preceded this land contract, which were fully understood by the defendant, as were also the circumstances surrounding the transaction, that both parties understood that the arrangement was one through which the defendant was to acquire outstanding tax titles, and that the price paid complainant was based upon that understanding; oral, it is true, but nevertheless one which had a substantial bearing upon complainant's consent to sell and the price charged.

We find evidence which tends to corroborate this, and although the final written contract imposes no such obligation in terms, the defendant did, after the time that the first option was made, obtain other tax interests and titles, by purchase and redemption, and when

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the conclusion was reached to surrender the contract, he apparently recognized the claim that under the dealings had he was in duty bound to surrender the perfected title. His excuse now is ignorance of the law, an ignorance which is most surprising for a dealer in lands and titles to the extent that Wheeler and Opdyke, his associates, appear to have been. Although not legally bound in writing to purchase these titles for the benefit of the security of the vendor, it was equitable for him to carry out his oral promise, and having recognized his obligation by attempting to do so, accepting a release from his promise on executing a deed through the surrender, equity does not demand that he be allowed to disregard such settlement. We therefore agree with the trial judge that there was no fraud on the part of complainant, and that equity does not demand a limitation on the interest mentioned in the quitclaim deed, and that the proofs warrant the decree made by him.

The decree is affirmed, with costs.

GRANT, C. J., and BLAIR, MONTGOMERY, and OSTRANDER, JJ., concurred.

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HARTZ v. DETROIT, PLYMOUTH & NORTHVILLE RAILWAY.

1. EJECTMENT — PLEADING — DECLARATION — AMENDMENT — PROPRIETY.
   Where a declaration in ejectment described the entire piece of land owned by the plaintiff, only a small portion of which was involved in the suit, an amendment describing particularly the disputed piece was properly allowed.

2. WATERS AND WATERCOURSES — RIPARIAN RIGHTS — BED OF STREAM—OWNERSHIP.
   The owner of lands abutting on a watercourse owns to the middle of the stream.

3. SAME—MILL POND—OWNER OF SHORE—OWNERSHIP OF BED.
   Where the title of the owner of lands abutting on an artificial mill pond, formed by damming the stream, is derived from deeds describing his land as running "along the bank of said mill pond" and as running "along the edge of said mill pond," he owns to the middle of the thread of the stream, including the right to the water front, and the use of the water in the stream in its natural state, in case the pond should be discontinued.

Error to Wayne; Hosmer, J. Submitted June 8, 1908. (Docket No. 47.) Decided June 27, 1908.

Ejectment by John C. Hartz against the Detroit, Plymouth & Northville Railway. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

C. C. Yerkes, for appellant.

Keena, Lightner & Oxtoby, for appellee.

GRANT, C. J. This is an action of ejectment. After suit was commenced, the defendant filed a bill of complaint to enjoin the further prosecution of the suit, which was decided both in the circuit court in chancery and in this court against the contention of the defendant. *De-*

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troit, etc., R. Co. v. *Hartz*, 147 Mich. 354. The suit at law was afterwards tried, in which the plaintiff recovered a judgment.

Two questions are raised:

1. Did the court err in permitting an amendment to the declaration? The original declaration contained the description of the entire piece of land owned by the plaintiff, only a small part of which was involved in the suit. The court permitted an amendment describing particularly the disputed piece of land. The defendant insists that the declaration, not containing the specific description in dispute, was fatally defective and not subject to amendment. This contention is answered by *Ludeman* v. *Hirth*, 96 Mich. 17; *Hoban* v. *Cable*, 102 Mich. 213. The amendment was proper.

2. The second question, as stated by the defendant's counsel, is, "Does the fee of plaintiff extend to the thread of the stream in the mill pond or stop at its banks?" Plaintiff owns the land on both sides of the stream and pond. In one of plaintiff's deeds the land is described as running "along the bank of said mill pond, * * * to the southeast corner of the bridge of said highway." The description of the deed conveying the land upon the other side of the pond, runs "southerly along the edge of said mill pond to the center of the highway." The defendant's bridge extends over the lower end of this mill pond about 20 feet above, and parallel to, the highway bridge, standing practically at the point where the stream leaves the pond.

It is the settled law in Michigan that the owner of lands abutting on a watercourse owns to the middle of the stream. *Butler* v. *Railroad Co.*, 85 Mich. 246, affirmed by the Supreme Court of the United States, *Grand Rapids, etc., R. Co.* v. *Butler*, 159 U. S. 87. The Supreme Court of the United States, speaking through Chief Justice Fuller, said:

"In Michigan the common law prevails, and the rule is sustained by an unbroken line of authorities that a

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grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof."

This is conceded by the learned counsel for the defendant, but he insists that there is a distinction to be drawn between natural and artificial streams and ponds. The stream in this case is not an artificial one. The boundaries of the stream have been changed by artificial means. Counsel cite no case in Michigan where this precise question has been raised.

Where the boundary of the land conveyed was described as "east by the pond" (an artificial one), it was held that the grantee took to the middle of the original stream the same as if no pond existed. *Mill River Woolen Manfg. Co.* v. *Smith*, 34 Conn. 462.

So, where an artificial pond was created by damming a stream, it was held that "the same rule applies to the pond as to the stream before the dam was built." *Mansur* v. *Blake*, 62 Me. 38. A like holding is found in *Lowell* v. *Robinson*, 16 Me. 357. See, also, *Paine* v. *Woods*, 108 Mass. 160, at pages 169, 170; *Wheeler* v. *Spinola*, 54 N. Y. 377; *Waterman* v. *Johnson*, 13 Pick. (Mass.) 261; 5 Cyc. p. 900; 4 Am. & Eng. Enc. Law (2d Ed.), p. 832.

There is nothing in the language of these deeds to indicate an intention on the part of the grantors to retain title to the land lying between the edge of the water of this pond and the middle thread of the stream. It seems to us reasonable to hold that these deeds conveyed to the plaintiff the right to the water front and for the use of the water in the stream in its natural state, should the artificial pond be discontinued. It follows that the circuit judge was right in directing a verdict for the plaintiff for the land covered by the bridge.

The judgment is affirmed.

BLAIR, MOORE, CARPENTER, and MCALVAY, JJ., concurred.

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WESTCOTT *v.* WADE.

1. ACTION—ACCRUAL—CONTRACT FOR SERVICES.
   Where, in an action for the price of sawing certain lumber, plaintiff's testimony is open to the construction that the contract obligated defendant to pay the agreed price per thousand as fast as the lumber was sawed, the court cannot say, as a matter of law, that the action was prematurely brought, on the ground that, under the contract, plaintiff was obliged to wait for his pay until the lumber was inspected.

2. SAVING QUESTIONS FOR REVIEW—EXCESSIVE VERDICT—MOTION FOR NEW TRIAL—NECESSITY.
   Where there is evidence to support the verdict rendered, the question of excessiveness cannot be considered, in the absence of a motion for a new trial raising the question.

Error to Iosco; Connine, J. Submitted June 8, 1908. (Docket No. 43.) Decided June 27, 1908.

Assumpsit by George Westcott against Reuben Wade for work and labor. There was judgment for plaintiff, and defendant brings error. Affirmed.

Jahraus & Rawden, for appellant.

Albert W. Black, for appellee.

Plaintiff and defendant entered into a verbal contract whereby the former was to saw certain lumber for the latter at $3 per thousand. Plaintiff completed his contract and brought this suit and recovered a verdict and judgment for the balance remaining unpaid of $81.50. Defendant asks us to reverse that judgment upon two grounds:

(1) That the suit was prematurely brought.

(2) That the verdict was excessive.

CARPENTER, J. (*after stating the facts*). 1. Was the suit prematurely brought?

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Defendant contends that under the verbal contract testified to by plaintiff he had no right to pay until the lumber was inspected, and this suit was brought before that inspection. We answer this contention by saying that the testimony of plaintiff is certainly open to the construction that the contract obligated defendant to pay $3 per thousand as fast as the lumber was sawed. Plaintiff testified that defendant said, "as fast as you cut the lumber you will be paid the money." It cannot, therefore, be said, as a matter of law, that plaintiff was obliged to wait for his money until the lumber was inspected. We therefore overrule defendant's contention that this suit was prematurely brought.

2. Was the judgment excessive?

Defendant contends that it was, to the amount of $10.51. We content ourselves with saying that there was evidence from which the jury might find that the amount of the damages was $81.50. Perhaps they should have found a verdict for a smaller amount. If so, that question should have been raised by a motion for a new trial. It was not so raised and we cannot consider it.

Judgment affirmed.

GRANT, C. J., and BLAIR, MOORE, and MCALVAY, JJ., concurred.

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McINTYRE *v.* MURPHY.

1. PLEADING — DECLARATION—AMENDMENT — TRESPASS — STATUTE OF JEOFAILS.

   Where a declaration states that recovery is sought under section 11206, 3 Comp. Laws, relative to treble damages for trespass on lands, and it is conceded that the case made in the declaration is not within the section, no prejudice arises from allowing the plaintiff to amend at the conclusion of the trial by striking out the allusion to the statute, such amendment being clearly authorized by section 10268, 3 Comp. Laws.

2. FORCIBLE ENTRY AND DETAINER—WHAT CONSTITUTES.

   Where a vendor, entitled to possession for default of the purchaser, attempts by a display of force to remove the purchaser's goods from the premises, the fact that the vendor and his employés obtained entry into the house without force does not render his conduct any the less a violation of the statute against forcible entries. Section 11153, 3 Comp. Laws.

3. SAME—RIGHT OF ACTION.

   Where a person not entitled to possession is evicted contrary to the forcible entry and detainer statute, he cannot recover damages for being disturbed in his possession of the land, but he may recover compensation for any injuries done to himself or his personal property in the course of the eviction.

4. EVIDENCE—PERSONAL INJURIES—MATERIALITY.

   In a personal injury case it is not error to refuse to compel plaintiff's physician to state, on cross-examination, what treatment he gave, on the theory that the treatment might have had something to do with her condition, since, if the treatment had not been proper, that fact would not lessen defendant's liability.

Error to Berrien; Coolidge, J. Submitted June 8, 1908. (Docket No. 37.) Decided June 27, 1908.

Trespass quare clausum fregit by Sarah E. McIntyre against Mary L. Murphy. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Affirmed.

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James O'Hara, for appellant.

Cady & Andrews, for appellee.

March 4, 1907, plaintiff and defendant entered into a written contract whereby the defendant sold to the plaintiff certain land in the township of Chikaming in Berrien county for the sum of $7,000. Plaintiff paid part of this consideration and was given possession of the land. A payment became due in August, 1907. This payment was not made by plaintiff. Defendant demanded possession. Plaintiff refused to comply with this demand. By the terms of the contract this refusal entitled defendant to possession. To secure this possession, she entered the house very early in the morning of September 26, 1907, and before the family had had breakfast. The house at this time was occupied by plaintiff—who was in bed sick—her daughter, Mrs. Cheshire, and two or three children, who were not out of bed. When defendant entered the house, as she testified:

"I told Mrs. Cheshire I wanted to speak to her mother, and I passed into her mother's room and sat down in a rocking chair at her head. I told her that I wanted my money, and she said that her lawyer would see to her affairs."

At this point defendant's husband, his regular hired man, and two other men specially hired for the purpose, entered the house and told Mrs. Cheshire, in tones heard by the plaintiff, "we are going to move you folks out of here today; we are going to put your stuff in the street." She said "you ain't going to," and he said "that is what we came for." Defendant, her husband and the three hired servants thereupon proceeded to carry out their plan, notwithstanding remonstrances and forcible opposition on the part of Mrs. Cheshire. They had so far completed their undertaking that they had removed from the house practically everything except the little furniture in the room where plaintiff was lying sick when they were compelled to desist by the opportune arrival of plain-

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tiff's counsel. In consequence of their conduct, plaintiff was terrified and her illness was very much aggravated. She brought this suit to recover compensation. Her declaration set forth the foregoing facts and also stated that recovery was sought under the "provisions of section 11206, 3 Comp. Laws, relative to treble damages for trespass on lands." At the conclusion of the trial the court permitted plaintiff to amend her declaration by striking therefrom all reference to said section 11206 and instructed the jury to render a verdict in plaintiff's favor. Defendant appeals to this court and asks a reversal upon grounds which will be referred to in the opinion.

CARPENTER, J. (*after stating the facts*). *First.* It is contended that the trial court erred in permitting plaintiff to amend her declaration in the manner above indicated. This complaint must be overruled. It is conceded that the case made in plaintiff's declaration was not within the section 11206, 3 Comp. Laws, and defendant was not prejudiced by the amendment which was clearly authorized by section 10268, 3 Comp. Laws.

Second. Did the trial court err in directing a verdict in plaintiff's favor? It is contended that he did. In another controversy between these same parties we said defendant was entitled to take peaceable possession of the land in controversy. See *Murphy* v. *McIntyre*, 152 Mich. 591. The question arises, Was defendant endeavoring to take peaceable possession of this land or was her conduct prohibited by our statute prohibiting forcible entries and detainers? Section 11153, 3 Comp. Laws. That section reads:

"No person shall make any entry into lands, tenements or other possessions, but in cases where entry is given by law; and, in such cases, he shall not enter with force, but only in a peaceable manner."

It is urged that as defendant used no force to get into the house she did not violate this statute. This statute is substantially a re-enactment of an old English statute en-

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acted in the fifth year of the reign of Richard II, and it has been the subject of very much litigation. We answer the contention under consideration by quoting from a recent English decision:

"Mr. Cookson says that the statute of Richard only applies to entry upon land, and that if I, who have a title, can get peaceably over the border of the land which is in the possession of a person who has no title, the possession follows the title; I am then in possession, and I may use all necessary force to put out the person who had been in possession. In my judgment that is not the law. The statute of Richard II, as I have already pointed out, prohibits an entry with a strong hand, which means, as I understand it, coming with a multitude of people or any excessive number of persons. The possession can only be taken in a peaceable and easy manner. If the operation of the statute is confined to the mere act of getting over the border, the edge, of the property in question peaceably, the statute is evidently not adequate to meet the evil which it was intended to repress, viz., the evil of persons who have a right, as well as those who have not a right, causing disturbance, inaugurating civil war, for the purpose of obtaining possession of that which is or which they claim to be their property. Accordingly, it appears to me to be clear law, and I desire to restate it, that, if an entry be made peaceably, and if, after entry made, and before actual and complete possession has been obtained, violence be used towards the person who is in possession, that is criminal within the statute of Richard II." *Edwick* v. *Hawkes*, L. R. 18 Chan. Div. 210.

To the same effect is our own decision of *Seitz* v. *Miles*, 16 Mich. 455, where it was said:

"To constitute a forcible entry within the meaning of the statute, it is not necessary that the actual invasion of the premises should at the very moment be attended by the circumstances requisite to give it the character of a forcible entry, or be accompanied by threats, actual force or violence, or any conduct which would constitute a breach of the peace; but if the entry be obtained by stealth or stratagem, or without real violence, and the party entering evinces his purpose in having entered to have been the expulsion of the party in possession, and it is followed up by actual expulsion by means of personal

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threats or violence, or superior force, it will amount to a forcible entry."

The next question is this: Did the subsequent conduct of defendant, her husband and agent characterize her entry as forcible? It does not appear that actual violence was used toward the inmates of this house. But there was a superiority of numbers, a display of force calculated to intimidate and terrify them and it did terrify them.

"But the law is, where the party, either by his behavior or speech, at the time of his entry, gives those, who are in possession, just cause to fear, that he will do them some bodily harm, if they do not give way to him, his entry is esteemed forcible; whether he cause the terror, by taking with him such an unusual number of servants, or by arming himself in such a manner as plainly to indicate a design to back his pretensions by force." *State* v. *Pollok*, 4 Ired. Law (N. C.), 309.

"In this case there was, it is true, no one assaulted, nor is it necessary that there should be, to constitute a forcible entry; for, if persons either take or keep possession of either house or land, with such number of persons, and show of force, as is calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient in point of law to constitute a forcible entry, or a forcible detainer." *Milner* v. *Maclean*, 2 Car. & P. 18.

To constitute a forcible entry—

"It is not necessary that it should be accompanied with tumult or riot, directed against the person of the party in possession. It will be sufficient if the entry is attended with such a display of force as manifests an intention to intimidate the party in possession, or deter him from defending his rights, or to excite him to repel the invasion of his possession and thus bring about * * * a breach of the peace." *Ely* v. *Yore*, 71 Cal. 133.

It is clear that under these authorities the entry of defendant was forcible and contrary to the statute.

The next question that arises is: Did this unlawful conduct of the defendant constitute a right of action? It has been held (see *Pollen* v. *Brewer*, 7 C. B. [N. S.] 371; *Ives* v. *Ives*, 13 Johns. [N. Y.] 235) that the person evicted contrary to the forcible entry and detainer statute

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cannot recover damages for being disturbed in his possession of the land. But it is also held (*Newton* v. *Harland*, 1 Man. & G. 644; *Beddall* v. *Maitland*, L. R. 17 Chan. Div. 174; *Edwick* v. *Hawkes*, L. R. 18 Chan. Div. 199) that he may recover compensation for any injuries done to himself or his personal property in the course of the eviction. This distinction which has been repudiated by very respectable authorities (see *Souter* v. *Codman*, 14 R. I. 119, and authorities there cited) seems to us sound. The evicted person cannot recover damages for injury to his possession of the land because his possession is unlawful. *Beddall* v. *Maitland*, supra. To allow him to recover in such a case would be to permit him to recover for damages to property which is not his. But very different considerations arise when he seeks compensation for injuries done to himself or to his personal property. The eviction of himself or the removal of his goods from the house is a wrongful act, made so by statute, and the damages resulting therefrom belong to him. For such a wrong there should be, and we hold there is, a right of action. Under this reasoning plaintiff was entitled to recover damages resulting to herself and to her property by the wrongful conduct of the defendant and those were the damages which she recovered in this case.

Third. The physician who attended plaintiff the day of the attempted eviction refused, on cross-examination, to state just what medicine he gave her, and the trial court declined to compel him to so state. It is urged that this ruling was erroneous because "his treatment might have had something to do with the subsequent condition." It is a sufficient answer to this complaint to say that, under our decision of *Reed* v. *City of Detroit*, 108 Mich. 224, this testimony would not have lessened or in any way affected defendant's liability. We think no other complaint demands discussion.

The judgment is affirmed.

GRANT, C. J., and BLAIR, MOORE, and MCALVAY, JJ., concurred.

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CURRY *v.* LARKE.

TAXATION—TAX SALES—NOTICE—SUFFICIENCY.

A notice of the sale of land for taxes which is insufficient for the reason that no State or county is named in the description in the body thereof is not aided by printed and written indorsements on the back thereof showing the State and county.

Appeals from Presque Isle; Emerick, J. Submitted June 8, 1908. (Docket Nos. 41, 42.) Decided June 27, 1908.

Bills by Walter J. Curry against Augusta Larke and Edward E. Ayer, and against Frederic Denny Larke and Edward E. Ayer to quiet title to certain land. From decrees dismissing the bills, complainant appeals. Affirmed.

Jahraus & Rawden, for complainant.

BLAIR, J. The determination of both of the above cases depends upon the legal sufficiency of the notices of reconveyance served by complainant, as purchaser of certain tax titles, upon defendants. No State or county is named in the description in the body of the notice, and it is conceded that, "if that were all of the notice and nothing else appeared thereon whereby the person receiving the same could identify the lands, they would clearly be defective under *Tucker* v. *Van Winkle*, 142 Mich. 210." It is contended, however, that these cases are distinguishable from *Tucker* v. *Van Winkle* because there was printed on the backs of the notices served the following: "State of Michigan, County of ———" and in the blank space was written, "Presque Isle."

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We agree with the circuit judge that the indorsements upon the notices were no part of the statutory notice and the decrees dismissing the bills of complaint are affirmed.

GRANT, C. J., and MOORE, CARPENTER, and MCALVAY, JJ., concurred.

HOWLAND v. CAILLE.

1. PLEADING—DECLARATION—AMENDMENT—ALLOWANCE—PROPRIETY.

   Where a declaration on the common money counts was accompanied by a bill of particulars disclosing an intention to recover money due for land sold on a contract assigned to plaintiff, there was no error in allowing plaintiff leave to amend the declaration at the close of his case so as to set forth the case described in the bill, including an allegation that the contract had been assigned to plaintiff.

2. SAVING QUESTIONS FOR REVIEW—THEORY BELOW—SHIFTING GROUNDS.

   Where defendant's theory below was that the declaration upon the common money counts would not authorize a recovery of money due for land sold, and that plaintiff was not entitled to recover because no assignment of the land contract to him was pleaded, and that the declaration was not amendable in these respects, a contention in this court, not presented to the court below, that plaintiff's assignor was a mere trustee, and his assignment a nullity, will not be considered.

Error to Wayne; Brooke, J. Submitted June 10, 1908. (Docket No. 48.) Decided June 27, 1908.

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Assumpsit by J. Ward Howland, administrator of the estate of Arthur D. Howland, deceased, against A. Arthur Caille and another for an amount due on a land contract. There was judgment for plaintiff, and defendants bring error. Affirmed.

Jonathan Palmer, Jr. (*Elbridge F. Bacon*, of counsel), for appellants.

Wilkinson, Post & Oxtoby, for appellee.

BLAIR, J. March 18, 1898, Harry C. Hall and wife executed a warranty deed to John Ward of three lots in the city of Detroit for an expressed consideration of $2,800. March 22, 1898, Ward and Hall executed a land contract of one of the three lots, conveying the same to Hall for an expressed consideration of $2,500. April 28, 1899, Hall assigned the land contract to William J. Gutow, who assumed its performance. September 15, 1899, at the request of George W. Meyers, a partner of Gutow, and who had constructed a house on the lot in question and had conducted negotiations for a sale of the lot to defendants, John Ward and the defendants executed a land contract in duplicate conveying the lot to defendants for an expressed consideration of $4,500, payable "Eleven hundred dollars at the date hereof and the remaining thirty-four hundred dollars in monthly payments of fifty dollars or more in each month," etc. This contract was recorded November 27, 1899, in the office of the register of deeds and the original contract was retired. One thousand one hundred dollars was paid on this contract September 15, 1899, of which amount Meyers received $700. Three further payments, amounting in all to $200, were made to Ward, leaving a balance due January 24, 1900, of $3,200. Mr. Ward having died about this time, and his estate being indebted to Mary E. Barnard,—

"This security with perhaps two or three hundred

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other securities was turned over to Mr. Barnard, a good many of them the title being held in Mr. Ward."

The contract was not formally assigned to Mr. Barnard or to his sister, for whom he acted, but, according to the books of John Ward, was placed "in charge of H. F. Barnard." Mr. Barnard's books contained the following entries:

"This entry is headed A. Arthur Caille and Caty A. Caille, wife, from John Ward, M. E. B. (which refers to Mary E. Barnard), April 27, 1900, September 15, 1899, 6 per cent., 15,392 (that is the page from Mr. Ward's records).

"*Q.* '$4,500; $1,100 down, $50 or more monthly, interest semi-annually; lot 186, William Y. Hamlyn, S. J. Brown's subdivision of L. 3 and 4 of quarter section 57 of the 10,000 A. T. plat L. H. page 72. Said lot lying on the northerly side of Bethune avenue, between John R. and Brush streets. Insurance $2,500, Western Underwriters, March, 1901.' Right-hand side, 'by Smith' entries are, '1900, May 1, to principal charged, $2,750. To interest charged $20.62.'

"June 16, 1900, charged $2,600. Credited $150. September 15, 1900, charged $2,400, credited $200. September 20th, interest to September 15th, charged $2,350, credited, principal $50; interest $80.25. January 25, 1901, received payment in full, deed given by J. Ward Howland, executor, to A. A. and C. A. Caille, credited $2,350, principal; $50.53 interest. 'The charge column is balance $2,750, and the credit column balance $2,750.'

"*Q.* Are you able to state, Mrs. Gies, whether these entries include all payments made by A. Arthur Caille or anyone for him upon this contract at your office?

"*A.* Yes, sir."

January 24, 1901, J. Ward Howland, as sole surviving executor of the estate of John Ward, deceased, executed a warranty deed of the lot to defendants, reciting and acknowledging receipt of the consideration of $4,500. Afterwards and prior to the commencement of this suit, defendants conveyed the lot to others. January 25, 1901, Barnard gave defendants the following receipt:

"Received from A. Arthur Caille, duplicate contract

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for lot 186 Bethune Ave. E., same having been fulfilled and canceled by deed this day of said property."

The indorsements of payments on defendants' copy of the contract agreed precisely with the indorsements on the Ward copy and left a balance due of $450 of principal, and, apart from the prima facie evidence of the receipts and recitals, the evidence is conclusive that such amount was still due when the deed was executed and that the deed was made by mistake. Defendants having refused to pay this balance, Arthur D. Howland, to whom the claim had been assigned, began suit November 19, 1903, by declaration on the common money counts, with the following bill of particulars attached:

"Balance of purchase price of premises situated in the city of Detroit, Wayne county, Michigan, described as lot one hundred eighty-six (186) of William Y. Hamlin and S. J. Brown's subdivision of lots three (3) and four (4), in quarter section fifty-seven (57) of the Ten Thousand Acre Tract, sold to defendants herein by John Ward, now deceased, his interest therein having been assigned to plaintiff	$450 00
"Interest on same from March 15, 1900, to October 1, 1903	125 57
"Total due	$575 57"

To this declaration, defendants pleaded the general issue with notice as follows:

"You Will Please to Take Notice: That the defendants will give in evidence of the general issue above pleaded and insist in their defense:

"1st. That the property mentioned in plaintiff's bill of particulars in the above entitled cause, has been paid for by the defendants, receipt in full received for such payment and a deed of said property executed and delivered to said defendants in fulfillment and cancellation of the contract formerly held for said property.

"2d. The said plaintiff, if he ever had a cause of action against said defendants, has been guilty of laches, and has lost the same, as said property was deeded to said defendants under the contract held by the defendants for the same, and said property has since been sold and deeded

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away by said defendants, prior to any claim being made by said plaintiff or the commencement of this suit."

Arthur D. Howland having died prior to the trial, the suit was revived in the name of the present plaintiff. Defendants' counsel, throughout the trial, made objections to the admission of testimony, for the reasons that the declaration on the money counts did not authorize a recovery of the balance due on the land contract and that the declaration did not allege an assignment of the contract to the plaintiff. These reasons were repeated at the close of the testimony in a motion to strike out all the evidence, and this motion having been overruled, defendants' counsel asked the court to direct a verdict for defendants, for the following reasons:

"1. Because of the variance in the proofs and the pleadings.

"2. Because the declaration does not count upon the fact that recovery is sought for money due for land sold.

"3. Because the declaration does not allege an assignment from the vendor of the lands to the plaintiff.

"4. Because the plaintiff has failed to make out a case under the declaration, which has never been amended, nor any request made for any amendment."

Counsel for plaintiff thereupon asked leave to amend, and counsel for defendants declining to state whether he was surprised or not, the court granted such leave, against defendants' objection, saying, among other things:

"At the close of the plaintiff's case, the plaintiff having rested, motion was made by the defendant for a verdict upon the ground there is a fatal variance between the pleadings and the proofs offered for the reason that the declaration does not count upon the fact that the recovery is sought for money, due for land sold, and for the further reason that the declaration does not allege an assignment from the vendor of lands to the plaintiff. It is apparent from an examination of the pleadings that while the declaration is defective, as pointed out, the defendant could not be at any time in doubt as to the real cause of action because the bill of particulars and the declaration fully states that the plaintiff brings suit as assignee of John Ward,

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or the estate of John Ward, who, in his lifetime, had made the contract with the defendant, and under which contract the alleged balance is alleged to be due and payable."

The amended declaration which was filed was in proper form to authorize a recovery, if supported by the proofs, and obviated the objections referred to. Defendants put in no testimony and the issue of fact having been submitted to the jury, they returned a verdict in favor of plaintiff. To review the judgment entered upon the verdict, defendants prosecute this writ of error.

The assignments of error are grouped for argument in the principal brief under four heads. The assignments under the first head "raise the question whether the allegations in the declaration were sufficient to authorize the admission of the testimony objected to." The second head relates to the assignments alleging error in overruling the two motions to direct a verdict and raises the same legal questions as the first. The third head alleges error in permitting the amendment:

"1. Because such amendment was permitted after plaintiff had rested his case.

"2. Because such amendment introduced a new cause of action."

Under the fourth head it is alleged that the court erred:

"In charging the jury as follows:

"'If you believe the plaintiff's testimony under the pleadings as they now stand, it will be your duty to bring in a verdict for the plaintiff for the full amount claimed, $450.00, with interest, which has been computed at 6 per cent., which is $628.88. There is no possibility of any complication.'

"This charge in effect instructed the jury that under the pleadings as amended they should find a verdict for the plaintiff for the full amount claimed. It therefore raises the questions: (1) As to whether plaintiff's proofs made out a case against the defendants. (2) As to whether the declaration as amended was sufficient to authorize a verdict and judgment for plaintiff."

The original declaration, in connection with the bill of

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particulars, so far as the defendants were concerned, served all of the purposes of a formally correct declaration in apprising them, as shown by their pleading, of the precise nature of plaintiff's claim against them and enabling them to prepare their defense. The cause of action upon which the plaintiff attempted to declare, as indicated by the bill of particulars, was the same as the cause of action set forth in the amended declaration. Under such circumstances, the court did not err in permitting the amendment. *Jones* v. *Pendleton*, 151 Mich. 442.

It is argued in support of the assignments under the fourth head that the testimony shows: That, although the contract stood in the name of John Ward, it was held by him in trust for Mary E. Barnard, William J. Gutow and George W. Meyers, as appears by the testimony hereinbefore quoted and the following testimony of the witness Thomas, who was associated with Ward in business and remained with his executor till the estate was closed, viz.:

"*Q.* To whom, Mr. Thomas, did the excess that was due on this contract over and above $2,750, and the other charges you had against Gutow and Meyers belong? * * *

"*A.* At that time it belonged to William J. Gutow and George W. Meyers. * * *

"*Q.* What amount was due upon the Caille contract at the time it was turned over to Mr. Barnard?

"*A.* $3,200. * * *

"*Q.* Was there any writing in regard to the amount Mr. Barnard was to collect out of the payments upon the Caille contract? * * *

"*A.* Not outside the entries in our books.

"*Q.* How much of the $3,200, the balance that was due upon this contract, was to be paid to the Barnard office?

"*A.* $2,750."

That as no part of the amount claimed to be unpaid on this contract belonged to the estate of John Ward and the estate had no beneficial interest in the amount due on the contract or mortgage, the estate held the naked title solely for the benefit of the owners of the fund and an

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assignment of the contract by the executor would be a mere nullity.

That it did not require any written assignment to transfer the debt evidenced by the contract to Mary E. Barnard, William J. Gutow and George W. Meyers, but such transfer could be made by delivery of the contract or by parol.

That the settlement evidenced by Exhibit "I" conclusively shows that Gutow and Meyers had an interest in the moneys secured by the contract, amounting to over $450.

Exhibit "I" is as follows:

"THE JOHN WARD LOAN AND REALTY OFFICE.
"61 Home Bank Building,
"Telephone M. 2282.
"J. WARD HOWLAND, Manager.
"DETROIT, MICH., Nov. 1, 1904.

"Received of Mr. J. Ward Howland the sum of six hundred ($600) dollars, which I hereby acknowledge to be in full of any and all claims of any character and description against John Ward, his heirs, legatees or assigns growing out of transactions had between the said John Ward, George W. Meyers and William J. Gutow, or either of them, it being the intention of this instrument to finally, definitely and completely adjust and settle all matters between the said parties above mentioned.

"WILLIAM J. GUTOW,
"MARY GUTOW.

"I, George W. Meyers, hereby disclaim any interest, right or title in any of the transactions referred to in the above instrument, I having heretofore transferred all interest to William J. Gutow above mentioned.

"GEORGE W. MEYERS."

It is clear that no such point as this was made before the trial judge. The record demonstrates that the trial judge was given to understand that defendants were insisting that plaintiff was not entitled to recover and that defendants were entitled to a verdict because the declaration did not permit a recovery and was not amendable. The instruction complained of was necessarily made with this position of defendants' counsel in view. The ques-

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tions now raised are evidently the result of afterthought. In fairness to the circuit judge, they should have been presented for his consideration, and, not having been so presented, we must decline to consider them.

The judgment is affirmed.

MONTGOMERY, MOORE, CARPENTER, and MCALVAY, JJ., concurred.

HOULE v. SOCIETE ST. JEAN BAPTISTE.

1. LIFE INSURANCE — FRATERNAL INSURANCE — NONPAYMENT OF DUES—EFFECT.

   Where the laws of a fraternal beneficial society provide that no member can pretend to the benefits if he has neglected during three months to pay his monthly dues, and that every member who has neglected during one year to pay dues shall, after notice, be erased from the registry of the society, a member in arrears more than three months is not entitled to benefits, though not erased from the registry.

2. SAME—SEPARATE BENEFITS—SOURCE OF FUNDS.

   Where the members are entitled to participate in two different funds, viz., a widow and orphan fund, arising from assessments, and a funeral benefit fund, arising from monthly dues, a law providing that no member can pretend to benefits if he has neglected during three months to pay his monthly dues, applies to both funds, and a member so in arrears cannot participate in either fund.

3. SAME—NONPAYMENT OF DUES—EXCUSE.

   A conversation with the secretary of defendant society, relied upon as an excuse for the nonpayment of dues, is insufficient for that purpose where, giving it the utmost effect claimed for it, it only amounted to information that the dues were paid for a certain period, a fact which was true, and the nonpayment of subsequent dues caused the forfeiture.

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Error to Houghton; Streeter, J. Submitted June 10, 1908. (Docket No. 16.) Decided June 27, 1908.

Assumpsit by Emma Houle against the Societe St. Jean Baptiste on a policy of insurance. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

P. H. O'Brien, for appellant.

Shelden & Legris, for appellee.

The defendant is a fraternal beneficial society incorporated under the laws of this State. Its members are persons of French Canadian descent living in the county of Houghton. One of its objects—perhaps its main object—is to secure sick and death benefits to its members. Its death benefits are of two classes: one called a widow and orphan fund which is raised by an assessment of one dollar on each member; the other a funeral benefit of $50 which is paid out of the fund raised by monthly dues on the members. The laws of the order provide:

"The dues of members shall not be less than fifty cents per month, payable at the regular general meeting of the next month.

"No member can pretend to the benefits of the Society if he has neglected during three months to pay his monthly dues and fines which may have been imposed.

"Every member who will neglect during three months to pay his monthly dues and other dues, and who will become sick, will have no right to any benefits of the Society for his present sickness, even by paying the amount which he owes to the Society.

"Every member who has neglected during one year to pay his monthly dues and other dues, shall be after notice erased from the registry of the Society, or stricken from the registry of the Society."

Napoleon Houle, plaintiff's father, was a member of said society. In 1903 he removed from Houghton county, where he formerly resided, to another part of the State, instructing one of his sons to pay his dues to the society.

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No dues were paid after the month of February, 1904. June 3, 1904, Houle died. The day after his death the defendant society passed a resolution declaring him in arrears. The insured left surviving a daughter, the plaintiff, and three sons. The sons assigned their interest in the insurance benefits to plaintiff and she brought this suit. It was tried in the lower court before a jury. The foregoing facts were established. For the purpose of furnishing an excuse for the nonpayment of dues, plaintiff put upon the witness stand her brother Wilfred Houle, the son charged by the insured with the payment of the dues. He testified:

"I met him [the secretary of defendant society] on the street and asked him how my father stood with the society, and he told me that he didn't know exactly but he would look it up and let me know, so I didn't see him any more, but I went for probably a month and a half or two months. I met him again and I asked him if he had looked it up and he told me that he had forgotten all about it, but he would see to it that it was all right and he would let me know for sure. Of course, then I didn't see him any more after that, and the first thing I knew father died. * * * I testified in the lower court on the trial of this case, that I had seen Mr. Rouleau [the defendant's secretary] with regard to my father's dues around January, in the first instance, and then two or three weeks after, or around the first of February. * * * What I testified to in the lower court is as near as I can tell."

The trial court directed a verdict for the defendant and plaintiff asks us to reverse the judgment rendered therein.

CARPENTER, J. (*after stating the facts*). 1. It is contended by the plaintiff that until the society had taken action suspending the member, or until his name had been erased from the registry, he was entitled to these benefits. This contention is directly opposed to the language of the provision:

"No member can pretend to the benefits of the society

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if he has neglected for three months to pay his monthly dues."

2. It is urged that the failure to pay the monthly dues should not defeat recovery for the widow and orphan fund, so-called, because that was not derived from the monthly dues. This argument might with propriety be addressed to the society to induce them to change their laws. But it does not aid in the duty devolving upon this court, viz., the duty of construing the laws which were made. According to the language of those laws, and their proper construction, the failure to pay dues for three months deprived a member of the benefits of the society. This does not mean one of the benefits. This means all benefits of the society.

3. It is contended that the conversation which occurred between Wilfred Houle and defendant's secretary waived the payment of the dues. It is a sufficient answer to this contention to say that the dues referred to in the conversation were those which became due in January and February, and, assuming that the secretary informed Wilfred either by word or conduct that these were paid, he merely told him a fact that is established to be true by the testimony in this case. That fact did not justify a failure to pay the dues for the subsequent months, and that failure is what led to the loss of the benefits in suit.

The judgment is affirmed.

GRANT, C. J., and BLAIR, MOORE, and MCALVAY, JJ., concurred.

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SHERMAN v. ALBERTS.

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER —ORIGINAL OR COLLATERAL PROMISE—WHAT CONSTITUTES.

Where defendants stated to plaintiff "any beef you sell M. while he is working on our logs we will pay for," and plaintiff charged the beef upon his books to M., defendants' agreement was a "promise to answer for the debt of another person," which, under section 9515, 3 Comp. Laws, is required to be in writing.

Error to Wexford; Chittenden, J. Submitted June 11, 1908. (Docket No. 80.) Decided June 27, 1908.

Assumpsit by Job Sherman against Frank Alberts, Roy E. Alberts, and Earl Alberts, copartners as F. Alberts & Sons, for goods sold and delivered. There was judgment for plaintiff, and defendants bring error. Reversed.

Stephen H. Clink, for appellants.

Gaffney & Miltner, for appellee.

The defendants are copartners. They reside in Muskegon. During the winters of 1904-5 and 1905-6 they carried on lumbering operations in the county of Missaukee. They let a contract to a jobber named McGill. Their superintendent was one Thompson. Plaintiff supplied McGill with meat for the use of his men. Before doing this, as he testifies, the following conversation occurred between him and Thompson:

"I asked Mr. Thompson if I sold McGill beef, would he pay for it, and he said, yes, any beef you sell Mr. McGill while he is working on our logs we will pay for.'

Under this arrangement beef was sold during both seasons. It was charged upon plaintiff's books, "meat sold

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to McGill." It was all paid except a balance of $161 and some cents. For this balance plaintiff obtained an order from McGill which defendants refused to pay. He brought this suit and recovered a judgment which defendants ask us to reverse.

CARPENTER, J. (*after stating the facts*). The important question for our consideration is this: Was the agreement testified to by plaintiff a "promise to answer for the debt * * * of another person," required to be in writing by section 9515, 3 Comp. Laws? We think it was. From the terms of the agreement itself, and from the construction placed upon it by plaintiff, it must be inferred that the contractor, McGill, was his debtor for these goods. Being a debtor he could have been nothing less than the primary debtor. The obligation of the defendants was, then, that of a guarantor or surety. It was a promise to pay the debt of another and void because it was not in writing. While the language used differs somewhat from that in *Butters Salt & Lumber Co.* v. *Vogel*, 130 Mich. 33, it is ruled by that case. It follows that the trial court erred in refusing to direct a verdict for defendants. No other complaint demands discussion.

Judgment reversed and new trial ordered.

GRANT, C. J., and HOOKER, MOORE, and MCALVAY, JJ., concurred.

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CROZE *v.* ST. MARY'S CANAL MINERAL LAND CO.

1. CHATTEL MORTGAGES — FORECLOSURE — SALE — LIABILITY OF MORTGAGEE—EXCESSIVE SALE.

   Defendant having seized plaintiff's logs on a chattel mortgage and sold them in two lots for $7,718.43, the debt and expenses amounting to $7,051.71 in addition to services of the value of $700 to $800, an instruction holding it liable as for an excessive sale was erroneous, liability in such a case extending only to the surplus, if any, left after the debt and expenses are paid; the mortgagee not being required to sell the logs one by one until enough is realized to pay the debt and expenses, but being entitled to sell in quantity. MOORE, J., dissenting, on the ground that upon the case made by the record the instructions as a whole were sufficiently favorable to defendant.

2. SAME—NEGLIGENCE OF MORTGAGEE.

   In an action against the mortgagee of logs for negligence in caring for them after taking possession for the purpose of foreclosure, defendant is entitled to an instruction that it is not liable to plaintiff for its acts with respect to certain logs belonging to third persons which appear to have been intermingled with the mortgaged logs. MOORE, J., dissenting, on the ground that upon the case made by the record the instructions as a whole were sufficiently favorable to defendant.

3. SAME—DAMAGES—EVIDENCE.

   Where logs covered by a chattel mortgage were commingled by the owner with others not so covered, belonging to a third person, the mortgagor *held* not entitled to an instruction authorizing the recovery of damages against the mortgagee taking possession of the entire quantity for the purpose of foreclosure and negligently losing a part of them in transporting them to the place of sale, without showing what proportion of the logs so lost belonged to the several owners. MOORE, J., dissenting, on the ground that upon the case made by the record the instructions as a whole were sufficiently favorable to defendant.

4. PLEADING — DECLARATION — AMENDMENT — PROPRIETY — NEW CAUSE OF ACTION.

   A declaration in trover for the conversion of logs seized by

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defendant on a chattel mortgage and wrongfully removed from the place where seized, setting out certain negligent acts in transporting and caring for them, may be amended by adding a count claiming damages for the negligent acts described in the original declaration. GRANT, C. J., and HOOKER, J., dissenting.

5. CHATTEL MORTGAGES — FORECLOSURE — SALE — LIABILITY OF MORTGAGEE.

Where, in an action against a chattel mortgagee of logs for damages arising from foreclosure, there is testimony tending to support plaintiff's claim that after the debt and all reasonable expenses were satisfied there was a balance left, and that a large quantity of the logs were lost by defendant's negligence in transporting them to market, the court did not err in refusing to direct a verdict for defendant.

6. SAME—NEGLIGENCE OF MORTGAGEE — EVIDENCE — SUFFICIENCY.

In an action against a chattel mortgagee of logs for negligence in keeping and transporting them to market after seizure for the purpose of foreclosing, evidence examined, and *held*, that whether there was any loss of logs, and whether such loss was caused by the negligence of defendant in storing them in unsafe booms, and in attempting to tow them to market at a time of year when it was unsafe, were questions for the jury. GRANT, C. J., dissenting.

7. EVIDENCE—TESTIMONY AT FORMER TRIAL—ADMISSIBILITY—ABSENT WITNESS.

Where a witness was beyond the jurisdiction of the court, his testimony taken at a former trial of the case was properly admitted.

8. TRIAL—INSTRUCTIONS—CONSIDERATION AS WHOLE.

An excerpt from the charge should not be isolated from what preceded and followed it for the purpose of finding error.

Error to Houghton; Streeter, J. Submitted June 11, 1907. (Docket No. 26.) Decided July 1, 1908.

Trover by Joseph Croze against the St. Mary's Canal Mineral Land Company. There was judgment for plaintiff, and defendant brings error. Reversed.

Chadbourne & Rees, for appellant.

Tarsney & Fitzpatrick, for appellee.

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GRANT, C. J. A sufficient statement of the facts in this case is found in the opinion of this court (143 Mich. 514) reversing the judgment and remanding it for a new trial.

The original declaration, as stated in that opinion, contained two counts, one being the ordinary count in trover, the other a special count in trover alleging that the defendant wrongfully converted the timber to its own use by unlawfully and wrongfully removing it from the places where seized. This part of the declaration is as follows:

"And the plaintiff avers that the said Will C. Baudin did not pay to the said defendant said sum of $4,480 and interest thereon at seven per cent. per annum, as in said mortgage agreed and that thereafter and on to wit, the first day of September, 1901, the said defendant by its agents and servants seized and took possession of the entire quantity of logs and timber aforesaid belonging to said Will C. Baudin, including the 1,000,000 feet thereof aforesaid, which was owned by the said Baudin and not included in the terms and provisions of said chattel mortgage or affected thereby, and also seized and took possession of said 1,000,000 feet referred to in said chattel mortgage as having been sold to the Tamarack Mining Company. And the plaintiff avers that the said defendant did not then and there or at any time thereafter sell that portion thereof which was mortgaged to said defendant, at public auction after a like notice as is required by law for constable's sale nor did it exercise its option to sell the same at private sale without notice, as in said mortgage agreed, but unlawfully and wrongfully removed or caused to be removed a greater portion thereof, to wit, 2,500,000 feet of said hemlock logs, and to wit, 30,000 feet of said white pine logs, and to wit, 60,000 lineal feet of flat hemlock timber from the place and places where the said logs were seized and taken by said defendant and wrongfully and unlawfully converted the same to the use of the said defendant."

The special count also alleges a damage to the timber left upon the shore at Misery Bay by reason of its "becoming sap rotten, sap stained, wormeaten and discolored,"

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and that such injury was due to the carelessness, negligence, and wrongful conduct of the defendant in not caring for and protecting said logs. Aside from the allegations of damage to the logs left upon the bank at Misery Bay, the declaration was based entirely upon a conversion of the property by moving it from the places where seized and neglecting to sell the same according to the provisions of the mortgage to satisfy the debt. Upon the second trial no claim was made for damages to the logs left at Misery Bay.

We held in the former opinion that there was no conversion. There was not even a hint in the original declaration of liability for negligence in rafting and towing the logs from Misery Bay to Portage Lake, or in their care in Portage Lake. In fact most of the logs were already in Portage Lake, having been towed there during the season in several rafts by plaintiff's assignor, Baudin. After the former decision plaintiff asked and obtained leave to amend his declaration charging the defendant with negligence in towing the logs and in their care while in Portage Lake, alleging that the boom in Portage Lake broke on two or three occasions by which logs were lost, and that the breaking was due to the negligence of the defendant.

Since writing the above this court has decided *Jones* v. *Pendleton*, 151 Mich. 442. The original declaration in that case counted on a promise made by the defendant to pay plaintiff a commission on the sale of real estate. The plaintiff did not make the sale, but the sale was made through the intervention of another party. It was held that, although there was testimony tending to show that defendant told plaintiff that he should have his commission, though another party should effect the sale, he could not recover. *Jones* v. *Pendleton*, 134 Mich. 460.

Plaintiff then amended his declaration so as to include the promise that he should have the same commission though another party effected the sale. It is stated in the prevailing opinion in that case:

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"The plaintiff has but one cause of action. He failed to properly describe it. The question is, whether the court has power to permit plaintiff to amend his declaration so that he may recover on the precise cause of action for which he brought suit, but which he failed to properly describe in his declaration."

That is not the situation in this case. Here the plaintiff deliberately in his original declaration set forth his right of action to be a conversion of the timber by violating the terms of a chattel mortgage. No other cause of action is even hinted at, except as to some logs left at Misery Bay. It contains no hint of negligence in towing or booming or care.

In *Jones* v. *Pendleton* a commission was the sole cause of action. The plaintiff improperly described it. In this case the original and amended declarations described two absolutely independent causes of action, bearing no relation whatever to each other. The original says that defendant took and converted plaintiff's property because he had not complied with the terms of the chattel mortgage under which defendant seized it. The amended declaration says that defendant was negligent in handling and caring for the property after it had lawfully acquired possession. I think the case is clearly distinguishable from that of *Jones* v. *Pendleton*, and that this amendment was not permissible under the statute or any decisions of this court. I do not think that an action of trover for the conversion of property can, under the statute of amendments, be transformed into an action of negligence in the care of it. In the former case plaintiff is entitled to recover the value of the entire property, and in the latter only what damage has been done to the property.

It is not sufficient that the parties be the same. They are always the same in cases of amendment. It is not sufficient that the property be the same. Usually the property is the same. In this case the property is not the same. In the trover case the declaration asserts that defendant converted to its own use the entire of the property.

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In the second case plaintiff asserts there was no conversion, but that the defendant lost a part of the property through its negligence, and for that part only must it pay damages, and that upon a cause of action to which no reference is made in the original declaration.

2. I think there was no evidence of any negligence in booming the logs in Portage Lake, a narrow, land-locked harbor. It was a safe and proper place. Baudin and plaintiff had booms of some of these same logs there, which broke up before they were changed into the booms of the defendant. Their own witness testified:

"I think there were two batches of logs down there in Portage Lake, one somewhere near the Union Brewery on this side, and the other somewhere near the Hancock Pump House, a little above Griff's mill. They were left there until, I think, they broke up, some time in November. I didn't intend to disturb them at all, but they broke up, and I suggested that we bring them all down here and put them near the Isle Royale mill. Those rafts that were here in Portage Lake were in the condition in which they were found up to the time they broke up. We didn't disturb them at all. We didn't open one of them. They were not combined with the lot we brought down at the time. The first I knew about their breaking up was, I guess, from Mr. Nichols or somebody. I suggested to Mr. Goodell and Mr. Parnall that we take them and tow them down below the bridge and put them all in one lot, and lay them in back of Isle Royale there, somewhere, for the winter. I think we picked the logs up twice. We picked them up that fall. I superintended that work and ordered it done."

Several rafts—six in number according to plaintiff's own testimony—had been towed from Misery Bay to Portage Lake by plaintiff, who was employed by Baudin, and there tied up. There is no claim that they were not stored in a safe place, or that the boom was not properly constructed. The evidence of plaintiff is that it was one of the best booms in use. Plaintiff's own witness (Moore) testified that they were the best booms on the lake with the exception of the Nestor estate lake booms. There is

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no evidence that the booms used by the defendant were not sound, properly constructed and such as were in common use. The only evidence that is or can be relied upon to show negligence is the fact that the booms broke perhaps on three occasions. It is urged that this breakage was so frequent as to justify the inference that it was an improper boom. Two of plaintiff's booms towed by his own tugs from Misery Bay were fastened to the shore above the Portage Lake bridge. Both these broke loose in November, and the logs so far as possible were picked up by the defendant as soon as the breaking was discovered. Would this have been sufficient to justify the jury in finding that plaintiff's booms were in bad condition or improperly constructed? In determining this question we must refer quite fully to the testimony. One Vaudrin testified that late in the fall of 1901 he saw a raft break loose and saw a gang of men at the bridge picking up logs. There is no testimony to show whether these logs came from one of plaintiff's booms which had broken up, or from one of the defendant's booms. This same witness testified that at some time—he did not say when—he saw a number of logs around Portage Lake; that some farmers hauled them up and sawed them up for wood, but he does not give any idea as to the number. Whether these came from the booms of plaintiff or of defendant there is not a scintilla of evidence to show. Plaintiff testified that defendant took out his boom and put in its own; that the logs broke loose two or three times during that fall and the next spring. But plaintiff does not testify that these logs that broke loose in the fall did not come from his own booms which were tied to the shore of Portage Lake as above stated, and which it is conceded did break loose some time in November. It appears that plaintiff brought replevin for at least parts of his own booms.

The only reliable testimony is that of plaintiff's witness Moore. This witness testified that after the logs were

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stored along the shore between Snow Shoe Island and the Clubhouse—

"Nothing happened to the logs until next spring. There was a chain let loose in the spring. I got Mr. Croze's tugs—one or two of them—and surrounded them. I happened to see them going away, and happened to be lucky to get one of Mr. Croze's tugs, and ran a boom around them and surrounded them. That was in the spring of 1902. Nothing happened to the logs during the winter and up to the opening of navigation. There was no loss during that period. We didn't lose any logs in towing them down there from where they were first put. There may have been a stray log lost out, but nothing more than what would be usual in towing hemlock logs.

"In the spring of 1902 the logs were taken out and sorted. There was no loss of logs during that time up to the time they were sorted. * * *

"After the logs were sorted, the Tamarack logs were taken up to Dollar Bay; the Canal Company's logs were taken in back of Snow Shoe Island, between Snow Shoe Island and the shore. That is a protected place. I don't think in the towing and sorting, in taking them to the place for sorting and putting back, there was any loss of logs or timber, any more than what is usual. A log will slip out of the boom, or logs will crawl out between and over the boom chains occasionally. * * * They broke up again. I ain't sure but we did finally tow them up through Portage Lake again for the Canal Company. They had been moved from behind Snow Shoe Island before they broke up. * * *

"When they broke up they laid up here by the Copper Range Railroad landing. When the boom broke they notified me, and I got a tug and men there again to pick them up. The work of picking them up was done quite thoroughly. I think they got all. There might have been a stray log got away from us somewhere. We left them there in the boom again, and I think they broke again. I helped pick them up again, and we picked up until we were satisfied that we got them all, and they were put back in the boom again."

On cross-examination he testified:

"The booms broke some, a matter of two or three times, I guess. We picked up everything as far as we could."

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It appears from the plaintiff's evidence that the breaking of rafts is not uncommon. Plaintiff's assignor, Baudin, testified that two of his rafts from Misery Bay to Portage Lake "broke up" and the logs went mainly upon the shore. It is admitted that a percentage of logs is lost out of every raft, even in smooth weather. Out of the 4,600 logs above mentioned, called the beach logs, plaintiff's own evidence shows that at least 25 per cent. of them were logs belonging to other parties and which had escaped from booms being rafted over the lake.

Under these circumstances we do not think the law justifies the conclusion that the defendant was guilty of using insufficient or improperly constructed booms. Whether boats passing up and down accidentally ran into the boom, whether some unexpected pressure by storm or otherwise had been brought to bear upon it, or whether some evil-disposed persons had broken it, no one can tell or attempts to tell. Defendant put in no testimony, and the case is determinable upon the plaintiff's own evidence.

This boom lay in the waters of Portage Lake and was at any time subject to the examination of the plaintiff or anyone in his behalf. Its age and construction could easily have been ascertained. I cannot conceive of a more appropriate case for the application of the well-established rule that an accident of itself is no proof of negligence. The mere fact that the boom broke is not, in my opinion, evidence of negligence, any more than was the fact that a timber broke in the case of *Quincy Mining Co.* v. *Kitts*, 42 Mich. 34; or that a boiler front fell, as in *Toomey* v. *Steel Works*, 89 Mich. 249; or that a piece of machinery gave way, as in *Robinson* v. *Wright & Co.*, 94 Mich. 283.

Both the defendant and the Tamarack Mining Company (the latter owning a large proportion of the timber) were as interested in properly securing and caring for it as was either the plaintiff or his assignor, Baudin, who was pecuniarily irresponsible. Their own large interests

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would prompt them to proper care and diligence. There must be some tangible evidence of wrong, but there is nothing, except the bare fact that on two or three occasions the boom broke, to indicate any wrong.

3. The case was submitted to the jury upon another theory, viz., that the defendant had sold more of the mortgaged logs than was sufficient to pay the mortgage debt. Upon this point the court instructed the jury:

"If you find that the defendant company could have sold just enough to satisfy the amount of the mortgage and reasonable expenses, and that it did sell more than enough, then you could render a verdict in favor of the plaintiff for the value of the property which you have found was sold in excess of the necessary amount."

The mortgage authorized a public or private sale. The first sale made amounted to $5,300. I find no complaint made as to the price obtained at this sale, or the second sale. There was then due on the mortgage $4,950.40, Baudin having paid nothing. There had been paid for liens $983.02; sheriff's fees, $57.15; the expense of sorting, scaling, etc., was $257.64; rent of booms was $440. The towing bills for delivering logs after sorting were $363.50, making the amount due, $7,051.71. These items did not include the cost of towing the two rafts from Misery Bay to Portage Lake, which, according to plaintiff's own testimony, as to his charges for towing, could not be less than $700 or $800. The court instructed the jury that there was no claim that the first sale was sufficient to cover the amount due. Subsequently sales were made amounting to $2,413.43, making the total sales $7,713.43.

Under this condition of affairs, I think it was error to submit to the jury the question whether the defendant had sold more logs than it was entitled to sell under its mortgage. I think the court should have instructed the jury that the defendant sold the logs in accordance with the terms of the mortgage and was not liable for the value of any timber in excess thereof. If, after deducting from the amount of the sales all these legitimate expenses, to-

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gether with the mortgage debt and interest, any surplus was left, defendant was responsible only for such surplus. It was very small in any event, and it is doubtful if there was any. The law does not require that the defendant should have sold these logs one by one until it had realized enough to satisfy the mortgage. Such requirement would be impracticable and unreasonable. It was authorized to sell them in quantities, and so long as it acted reasonably and in good faith it was liable only for the surplus left in its hands. *Stromberg* v. *Lindberg*, 25 Minn. 513; *Johnston & Son* v. *Robuck*, 104 Iowa, 523. I find no evidence of bad faith or unreasonableness in the sales which defendant made.

4. The court was requested to instruct the jury that:

"From the testimony of Baudin, plaintiff's assignor, it appears that 4,600 logs, mentioned as having been left over from the year 1900, and which became a part of the mass of logs in 1901, being mingled with the new cut, were at the time of the alleged wrongs the property of the Tamarack Mining Company. They must, therefore, be eliminated from this case."

If these logs belonged to the Tamarack Mining Company, the defendant is not responsible either to plaintiff or his assignor therefor. The court instructed the jury that the million feet of logs covered by the Tamarack contract must be deducted from the total number taken, and for which the defendant would be liable. According to Baudin's testimony, these 4,600 logs appear to have been as much the property of the Tamarack Mining Company as were the million feet specified in the Tamarack contract. Baudin upon this point testified as follows:

"The cut of the previous year was all sold to the Tamarack, and these 4,600 logs was a part of the contract of the year before. I was to get out another million feet the next year. These 4,600 logs had been sold to the Tamarack before this time, I think. I made the same kind of a contract that I had the second year. That was the ame kind of a contract. I had a contract of four million feet the first year, and the next year another additional mil-

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lion, and these 4,600 logs that I had then were a part of the first year's contract that I did not deliver. The first year's contract took the entire cut. It took everything that year, and the second year's contract they only wanted the long timber. I had a different contract the first year. I have got it somewhere in my papers,—I haven't got it here."

Under this evidence, it is at least doubtful whether Baudin had any interest in these logs. (See opinion on rehearing, 143 Mich. 521.) We refer to this as the question may arise on a new trial.

5. The only other ground of negligence upon which the plaintiff could recover was for towing the logs at an improper season of the year when storms were liable to arise. The first raft, containing about 600,000 feet, was towed in safety, the weather being good. The next raft, containing about a like amount, suffered some loss. The court instructed the jury that, under the evidence, there was no loss on the first raft, and that they could not allow a loss of more than 25 per cent. on the second raft. The vice of the instruction lies in the fact that there was no testimony to indicate what proportion of the lost logs belonged to the Tamarack Mining Company, for the loss of which the defendant was not liable. It cannot be presumed that the 25 per cent. loss included only the logs covered by the mortgage. As the court instructed the jury, Baudin was responsible for the intermingling, "and the logs of the Tamarack Mining Company were so intermingled with the logs covered in the mortgage that it was unreasonable to expect them to be separated or sorted at Misery Bay." It was therefore essential to tow them to Portage Lake in order to sort them. I am unable to see how there was any data by which the jury could determine how many of the plaintiff's logs were lost in that raft. They were in any event a very small part of those for which the plaintiff recovered a judgment.

When the logs were sorted in Portage Lake, the scale showed that the Tamarack Mining Company owned 779,171

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feet, and that the logs covered by the mortgage amounted to 789,358 feet. If there was any testimony from which the jury might infer that the logs were mingled in this raft in the above proportion, there might be some data from which to estimate the loss for which the defendant was responsible. I am not prepared to say that this would not be proper, but as it is not argued it is unnecessary to determine it.

I think the judgment should be reversed and new trial granted.

HOOKER, J. I concur with the above on the first, third, fourth, and fifth points.

MOORE, J. The first trial of this case took place in May, 1904. The judgment on that trial was reversed by this court in an opinion found in 143 Mich. 514. A reference to that opinion will aid in understanding the questions involved here. After the reversal, counsel in the court below was allowed to amend the declaration. Defendant opposed the amendment and excepted to the order permitting the same. At the close of plaintiff's testimony a motion was made to direct a verdict in favor of defendant. This was overruled. Defendant offered no testimony. The jury rendered a verdict in the sum of $7,137.83. The case is brought here by writ of error.

The first assignment of error demanding attention is, Did the court err in permitting the amendment to the declaration? Counsel say that the additional counts added by the amendment set forth a new and different cause of action from that alleged in the original declaration, and that for this reason the allowance of the declaration was beyond the power of the court; that the original counts alleged a conversion of the property, while the amended declaration charges loss by reason of negligence in towing at an improper season of the year, by reason of insufficient fastenings while the logs were in Portage Lake, and also includes the claim for damage by reason of per-

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mitting a portion of the logs to remain on the banking ground. Also loss through negligence in conducting the work of rafting and booming.

An inspection of the pleadings will show that both declarations refer to the same logs, the same persons, and the same acts. We think the amendment was permissible under 1 Enc. Pl. & Prac., title "Amendments," pp. 558-564, *Pratt* v. *Montcalm Circuit Judge*, 105 Mich. 499, and *City of Detroit* v. *Wayne Circuit Judge*, 125 Mich. 634, and cases cited therein.

Error is assigned upon the admission of testimony. We think no good would come of a discussion of these assignments, indeed counsel do not lay much stress upon them. We shall content ourselves by saying we think the testimony was allowable. Error is assigned as to the argument of counsel. The statement criticised is based upon the record. It is urged that the assignment from Baudin to Croze was not broad enough to allow a recovery arising out of the negligence of the defendant. Among other things stated in the assignment is the following:

"And I do hereby sell, assign, transfer and set over unto the said Joseph Croze all my right, title, claim and interest in and to said logs and timber aforesaid."

We think this language, taken in connection with the rest of the assignment, was sufficient to give plaintiff the right to recover for loss arising from the negligence of defendant.

Did the court err in refusing to direct a verdict in favor of defendant? The record shows that defendant received from the logs and timber sold $7,613.43, while the mortgage debt was $4,480. It is the claim of plaintiff that, after all reasonable expenses are satisfied, a balance would still be due him. It is also claimed that a large quantity of the logs were lost by reason of the negligence of defendant; that no man of ordinary prudence would attempt to move the logs at the time they were moved.

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There was testimony tending to support this claim. We think the judge did not err in refusing to direct a verdict.

Counsel say:

"Nowhere in the record is there a scintilla of evidence as to the cause of the breaking up of the rafts in Portage Lake. No witness testifies to having seen the actual breaking up of any boom, and there is nothing shown by the record but the bare fact, that on one, two or three occasions, from some cause unknown, the logs became scattered."

And they argue that defendant cannot be held for any loss of logs in Portage Lake. The logs which were on the bank when seized were in a safe place. They were taken from there at a time of year when, according to the record, no reasonably prudent man would undertake to move them. After they reached Portage Lake the booms around them and the logs already there broke up at least three times, according to some of the testimony. It is true the agent of defendant testified he gathered up all the logs at these times, but there was other testimony tending to show that a large quantity of logs were not recovered. It is true, too, as stated by counsel, that no one testified to what caused these booms to break, but we think it became a question for the jury whether there was any loss of logs at Portage Lake, and, if so, whether it was caused by the negligent acts of defendant. We think the following cases are in point: *Schoepper* v. *Chemical Co.*, 113 Mich. 582; *La Fernier* v. *Wrecking Co.*, 129 Mich. 596, and the cases cited therein.

Was it error to permit the plaintiff to read in evidence the testimony of Mr. Moore? This testimony upon the first trial was offered in evidence by the defendant. Upon the second trial it was read by the attorney for the plaintiff. Counsel say they had no opportunity of cross-examination and the evidence should not have been read. The witness was shown to be beyond the jurisdiction of the court. We think the testimony competent.

Error is assigned upon the giving of plaintiff's requests

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to charge, the refusal to give certain of defendant's requests, and upon the general charge of the court. Many of the assignments of error in relation to the requests to charge are disposed of when we say the plaintiff made a case which it was proper to submit to the jury. Especial stress is laid upon an assignment of error growing out of the language in the general charge.

"The exact amount of logs banked and placed in the dam is not determined by the testimony. Estimates of the same have been given to you, but you will decide, if you can, from the testimony, what was the amount of logs at Misery Bay, being governed entirely by the testimony."

We quote from the brief:

"On what possible theory of the case can it be supposed that it was incumbent upon the jury to determine from the testimony the amount of logs at Misery Bay? This amount could have no relation to the quantity of logs lost in towing. If the defendant was liable for loss in towing, the amount of that loss must be determined by itself, and under the testimony in this case the amount of logs at Misery Bay, banked and placed in the dam by Baudin, can in no manner be relevant to the question of the quantity of logs lost in towing. Equally true is it that this amount can have no relation to the quantity of logs lost in Portage Lake, if any such were lost. It can in no way relate to the amount of timber actually sold by defendant in excess of the mortgage debt, if there was any such sale. The charge as given was therefore erroneous and extremely prejudicial, as impressing upon the jury the necessity of finding this quantity, and it being so impressed upon them, their minds must have been charged with the notion that that quantity was the measure of defendant's responsibility."

Other sentences are also quoted from the charge which are objected to. We think the language quoted should not be isolated from what preceded and what followed it.

Among other things the court charged the jury:

"Had nothing been done with the property from the time it was banked the winter preceding, you would be justified in holding that the same amount still remained

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upon the land, but there is positive testimony in this case that certain rafts were taken by Baudin from this mass of logs, and towed down to Portage Lake. Is there testimony in this case from which you can determine what the amount was which was so taken and conveyed from Misery Bay by the rafts? If there is, then you should consider that testimony in determining the amount which remained at Misery Bay, and which was taken possession of by the defendant. There is also testimony introduced on the part of the plaintiff as to the amount of logs which was finally left at Misery Bay, and testimony showing that the defendant took away two rafts from Misery Bay. If there is testimony in this case from which you can determine the amount which was left on the shore at Misery Bay, and the amount taken by the defendant in the two rafts, then you have a right to consider all that in determining the amount which was seized by the defendant at Misery Bay.

"In addition to that, there was a quantity seized by the defendant in Portage Lake, which amount is to be added to that taken by the defendant at Misery Bay, and these two together constitute the full amount of property for which the defendant is responsible. After the defendant had taken possession of the property at Misery Bay and in Portage Lake, it joined with the Tamarack Mining Company in appointing an agent to look after the interests of the two companies. The Tamarack Mining Company in its contract with Baudin was entitled to take possession of a million feet and to bring them down to Portage Lake and deliver them at Dollar Bay. The logs of the Tamarack Mining Company were so intermingled with the logs covered by the mortgage that it was unreasonable to expect them to be separated or sorted at Misery Bay.

"Acting for the two companies, their agent, Mr. Moore, took possession of the entire mass of logs; thereupon the title to the so-called Tamarack logs passed to the Tamarack Mining Company.

"Under all the testimony in this case, you will have to determine whether it was negligence for the defendant to tow or attempt to tow the logs in controversy from Misery Bay in September and October, 1901, and if you find the defendant was negligent, then it is liable to the plaintiff for such loss and damage as is shown by the evidence in this case to have resulted from the towing. The testi-

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mony in the case is undisputed that the time of year was not a safe time for towing on Lake Superior, but in determining the question as to the negligence of the defendant in this case, you should take into consideration all the circumstances which have appeared bearing upon that question; the fact that the man in charge was agent of the Tamarack Mining Company, the owner of a large portion of the logs, the situation of the logs on the shore of Misery Bay, and in the dam, and all other matters which have been testified to so far as they bear upon the question of the plaintiff's negligence in removing the logs at that time of the year.

"As I have said, the Tamarack Mining Company, at the time of the removal, was the owner of the logs. It had a right to handle them as it chose. They could not be separated from the Baudin logs where they were, and the condition of the logs at that time so far as the intermingling is concerned was entirely due to the acts of the plaintiff's assignor. I say all these matters should be considered by you in determining the question of the negligence of the defendant, and this should be borne in mind in considering what was done after the logs reached Portage Lake.

"The defendant in this case, having the interest of a mortgagee in the property, was obliged under the law to take such care of the property as a reasonably prudent man under like circumstances would take with regard to his own property, and the situation is not one where it appears from the testimony that the defendant company had the absolute control and right to do with the mass of logs as it chose until after the sorting was done in Portage Lake in the spring of 1902.

"It is also claimed by the plaintiff that the defendant company is responsible because it sold more logs than was necessary to satisfy the mortgage and reasonable expenses of sale. On this branch of the case a good deal was said to you about the seizure of certain logs by the defendant company, which were not included in the mortgage. You are not to consider this matter at all for this reason: All the property taken by the mortgagee was in the condition in which it was left by the mortgagor, so mixed and intermingled that it was impossible for the defendant company to distinguish and take just such a number of logs as were covered by the mortgage. The situation was created entirely by the mortgagor. He knew of the tak-

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ing of possession by the defendant company very soon after that was done. He made no claim upon it for any property not covered by the mortgage, he pointed out no logs which he claimed were not covered by the mortgage. So this is a matter not for your consideration in the slightest degree.

"Now, in determining whether more logs were sold than were sufficient to cover the mortgage debt and reasonable expenses, you must take the situation of things as they were at that time. You will allow the defendant company all the expenses properly incurred by it in removing the property from Misery Bay to Portage Lake, in caring for it at Portage Lake, its expenses in the sale and delivery and such other reasonable expenses as may have appeared in the evidence in this case. You will also consider the situation of the property, nature of the property at the time the second sale was made. No claim is made in this case that the first sale made by the defendant company satisfied the mortgage. If the situation of the property remaining in the hands of the defendant company was such as to render the second sale proper in its amount, and it were such that the defendant company could not select a particular amount from the mass at fair advantage, still leaving a small residue, it had a right to sell as it did, and the recovery (should you find that this was the state of affairs) of the excess price could not be had in this action. But if you find that the situation were otherwise, and that the defendant company could have sold just enough to satisfy the amount of the mortgage and reasonable expenses, and that it did sell more than enough, then you could render a verdict in favor of the plaintiff for the value of the property which you have found was sold in excess of the necessary amount.

"Now, gentlemen, there are certain questions which you must determine positively from the testimony. The jury will determine the quantity of logs and timber put in by Baudin and banked on the shore at Misery Bay and in the slough in 1901.

"From the quantity of logs and timber so determined, the jury will deduct one million feet of logs, eighteen feet and upwards in length, which became the property of the Tamarack Mining Company, and need not be further considered in this case. The jury will determine the quantity of logs towed by Baudin in the summer of 1901

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to Portage Lake, and the quantity thereof taken possession of by the defendant.

"The jury will determine the quantity of logs actually in the possession of the defendant in Portage Lake in the fall of 1901, which came from Misery Bay, including those towed by Baudin and those towed by the defendant.

"The jury will determine the quantity of logs lost by the defendant in towing from Misery Bay, and the value thereof. The jury will determine the quantity of logs lost in Portage Lake, and the value thereof. If the jury find the logs and timber were lost by reason of the negligence of the defendant, either in towing from Misery Bay or in Portage Lake, they will determine the quantity and the value thereof, and render a verdict therefor in favor of the plaintiff.

"Default having been made by Baudin in the payment of the sum secured by the chattel mortgage in evidence, the defendant was authorized to take possession of the mortgaged property and sell so much thereof as was necessary to satisfy the debt, interest and reasonable expenses, and to retain the same out of the proceeds of such sale. The overplus or residue of said property, so mortgaged, if any, belonged to, and should have been returned to, Baudin or his assignee, the plaintiff in this suit. You will determine the amount due, the interest thereon up to the time of sale, and reasonable expenses, and the quantity of logs and timber sold by the defendant for the purpose of satisfying the same, and fix and determine the quantity of logs and timber which should have been returned to Baudin and his assignee, the plaintiff, if any, and the value thereof, and return a verdict therefor in favor of the plaintiff, together with interest thereon from the time such mortgage debt was satisfied.

"The defendant, holding a chattel mortgage given by plaintiff's assignor, and there having been a breach of the condition by failure of Baudin, the assignor, to pay the indebtedness secured by the mortgage, had, under the terms of said mortgage, the absolute right to take possession of the mortgaged property, and also all other property of the same nature which had been indistinguishably intermingled with those described in the mortgage, which would by such intermingling become part of the mortgaged property.

"It appearing that there were mingled with the logs

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covered by the mortgage, certain logs belonging to the Tamarack Mining Company under a contract of sale thereof made by Baudin to said Mining Company, it was the duty of the defendant to gather the property together at Portage Lake and that the Tamarack logs should be withdrawn and sorted out before the mortgaged property could be sold.

"The defendant cannot be responsible in this case for any loss or damage to any of the Tamarack logs, which logs, as described in the contract, were one million feet of hemlock logs, eighteen feet and upwards in length, and fourteen inches and upwards in diameter at the smaller end.

"Under the allegations of the declaration in this cause, the defendant cannot be held responsible for any loss of logs except such as resulted directly from some acts of negligence of the defendant in handling the same. If you find that the defendant towed a portion of the logs in question at a season of the year when it was improper to do so, and that such towing was negligent, and showed a lack of ordinary care on the part of the defendant, the defendant then would be held responsible for any loss of logs occurring through such towing and as the direct result thereof, but could not be held for any further or additional losses.

"Under the testimony in this case you must confine yourselves to the consideration of loss resulting from the towing of the second raft towed under the management of defendant's agent, Mr. Moore. Under the testimony, this raft contained a little more than six hundred thousand feet. As the law will not permit you to guess how much more, you are limited to six hundred thousand feet as the size of this raft. The testimony of Mr. Moore, plaintiff's witness, shows that there was a small proportion of this raft lost, and that the loss was less than one-fourth. And there is no other testimony in the case on the subject. Under this testimony you can find no amount of loss resulting from any negligence of the defendant exceeding one-fourth of the quantity of this raft, and such loss as you may find must be apportioned between the Tamarack logs and the logs covered by the mortgage, and only so much of the loss as consisted of the logs covered by the mortgage can be chargeable to the defendant, and your verdict must be limited to the value of that particular loss. * * *

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"Any damages which the plaintiff may be entitled to recover are limited to his property interest in the property alleged to have been lost. This interest could only be that remaining over and above the amount due on the mortgage, together with interest and expenses of removal, caring for and sale of the property, together with all sums paid for liens upon the logs. If you should find any loss of property for which defendant is responsible under the principles laid down to you, nevertheless the plaintiff cannot recover therefor unless such loss exceeds any balance due under the mortgage, and this only to the extent of such excess.

"It appears from the testimony in this case that a certain portion of the logs were towed in the summer of 1901 to Portage Lake by Baudin and remained under his charge and control until the time when the defendant took possession under its mortgage. It further appears from the testimony there was some loss of logs from this quantity. The amount of such loss is wholly indeterminate under the testimony and you will therefore eliminate from consideration all or any part of the logs which were towed by Baudin before the Canal Company took possession, since the defendant cannot, under the testimony in this case, be held responsible for any loss of any portion of said logs, even if loss did occur from such portion after it took possession."

We do not think there is any just cause of complaint growing out of this charge. The judgment should be affirmed.

CARPENTER, J. I agree with the Chief Justice that this case should be reversed upon the grounds 3, 4, and 5 stated in his opinion. Upon the other propositions discussed in his opinion and in the opinion of Justice Moore, I agree with Justice MOORE.

BLAIR, MONTGOMERY, OSTRANDER, and MCALVAY, JJ., concurred with CARPENTER, J.

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FISHER v. RADFORD.[1]

1. APPEAL AND ERROR—DECISION—REVERSAL—NEW TRIAL.
Where a judgment for plaintiff is reversed because of a variance between the declaration and proofs that cannot be avoided by amendment without introducing a new cause of action, and limitations have run against the action, no new trial will be ordered.

2. FRAUD—FALSE REPRESENTATIONS—PLEADING—VARIANCE.
In an action for fraud consisting of false representations inducing the purchase of corporate stock, a judgment for plaintiff is reversed because of a fatal variance between the declaration and proofs; Mr. Justice MCALVAY, with whom concurs Mr. Justice CARPENTER, writing for reversal on the ground that the representation as alleged was made by defendant directly to plaintiff, while that proved was a letter written by defendant to a third person and by him shown to plaintiff, and the statement in the letter did not correspond with the allegations; and Mr. Justice OSTRANDER, with whom concur Justices HOOKER and MOORE, writing for reversal on the ground that the representations were alleged to have been made to induce the purchase of stock in a concern in N., while those proved were to induce the purchase of stock in a concern to be removed to and operated in Y.

Error to Wayne; Murphy, J. Submitted October 15, 1907. (Docket No. 46.) Decided July 1, 1908.

Case by Fred E. Fisher against George W. Radford, James W. Fales, Alexander McVittie, Frank N. Clark, and Anson Waring for false representations on the sale of corporate stock. There was judgment for plaintiff, and defendants bring error. Reversed, and no new trial ordered.

[1] Rehearing denied September 10, 1908.

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S. P. Bradley, for appellant Radford.

Maybury, Lucking, Emmons & Helfman, for appellants Fales and McVittie.

Fred A. Baker (*Albert B. Hall*, of counsel), for appellee.

MCALVAY, J. This suit was brought against defendants for false representations made on the sale of certain corporate stock. From a judgment for plaintiff, defendants bring error.

The principal and controlling question in the case is whether a verdict should have been directed for defendants on account of a variance between the declaration and the proofs. In the case of *Van Cleve* v. *Radford*, 149 Mich. 106, this court had under consideration a declaration in the exact language of the one in this case, as far as the allegations of false representations and fraudulent conduct of these defendants is concerned. And the crucial question in the case was whether there was a fatal variance between the declaration and the proofs. From the similarity of these declarations it is evident that the general features of the transactions are identical. The declaration in this suit contained two counts. The first count alleged the formation of a corporation known as the "Keeley Institute," setting forth its articles of association; that the capital stock of the company was increased by defendants and their associates without warrant, and for the purpose of fraud, from $50,000 to $250,000, and that defendants sold 100 shares for $2,500 to plaintiff, and that, to induce the plaintiff to buy the same, defendants fraudulently represented that their title to the stock was good, the shares legally issued, etc., and that on, to wit, the 15th day of May, 1892, and for a long time previous thereto, the net earnings of the corporation were 12 per cent. on $250,000, to wit, the sum of $30,000 per annum; that the increase of the capital stock was illegal and void; that the alleged stock dividend was fictitious, defendants had no right to the shares, and that the net earnings up

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to and at the time of the sale were not 12 per cent. on $250,000; that there were no profits; that plaintiff relied upon these misrepresentations and bought the stock on the 15th of May, 1892, and he afterwards, upon the discovery of the fraud and on the 12th day of July, 1893, tendered the same back, etc. Inasmuch as plaintiff admits that this recovery in this case was upon the first count, it will not be necessary to give the allegations contained in the second count of his declaration. The gravamen of the charge is that defendants, by fraudulently representing to him that the net earnings of the corporation at the time of the sale and for a long time previous were 12 per cent. on $250,000, induced him to purchase and sold to him 100 shares of stock for the sum of $2,500.

We will briefly consider the sale as alleged and as proved. From a careful examination of the record, we find that among other facts the proofs establish that the sale made was a sale of one-fifth interest in this corporation for the sum of $50,000 to certain subscribers in the city of Ypsilanti, who in the record and correspondence are called a syndicate; that plaintiff was one of these subscribers; that if this sale was made, the business was to be removed from Northville to Ypsilanti, where certain property was to be purchased for the occupancy and use of the corporation; that a memorandum in writing of the agreement between the Ypsilanti parties and defendants was made as follows:

"D. L. QUIRK, Pres. W. L. PACK, Cashier.
"The First National Bank, Ypsilanti, Mich. 189–.

"Mrs. Swift sells her place to Co. on contract, $25,000 down, balance $15,000 on or before one and two years, 6 per cent. (to be paid first from receipts of this institute). The present stockholders sell to your syndicate one-fifth interest in the Keeley Institute (to be removed to Ypsilanti) for $50,000 cash. Your syndicate loans to Co. $12,500 (one-half of down payment to Mrs. Swift) and takes the Co.'s note at 6 per cent. The present stockholders loan the same amount to Co. on the same terms for same purpose. These notes to be payable pro rata out of first earnings of this institute. Your syndicate and pres-

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ent stockholders to loan in equal portions sufficient to put Swift property in shape for business, the amount for that purpose being estimated not to exceed $5,000. The capital of the Co. to be increased to $250,000 or $500,000 as your syndicate desire."

That plaintiff gave his check for $2,500 to Mr. Glover; that he intrusted the money in his hands, and was largely induced to enter the deal because Mr. Glover and other parties he had confidence in were interested; that Mr. Glover was active in bringing about this sale and change of location. The record further shows that the money paid by plaintiff and the other subscribers at Ypsilanti was not paid directly to defendants, but was paid into the hands of the cashier of the bank as trustee, who paid the whole amount to defendants in accordance with the proposition contained in the following letter:

"THE FIRST NATIONAL BANK,
"YPSILANTI, MICH., May 14, 1892.

"GEO. W. RADFORD,
"Detroit.

"*Dear Sir:* Yours of the 12th recd. It will be impossible for me to get in today. I am on the sick list—in bed yesterday. I inclose you names of our stockholders, the list may be changed (added to) before the stock is issued. We will pay the money in to our bank here to Mr. W. L. Pack, cash., as trustee and take his receipt. Amount to be delivered to you on receipt of stock certificate, which will, I suppose, be satisfactory. Everything progressing nicely.

"Yours truly,
"J. W. VAN CLEVE.

"DANIEL L. QUIRK.
"HELEN C. SWIFT.
"HENRY P. GLOVER.
"JOHN W. VAN CLEVE.
"CHARLES E. KING.
"THOMAS W. MCANDREW.
"CARLISLE P. MCKINSTRY.
"FREDERICK E. FISHER.
"JOHN W. WATLING.
"CLARK S. WORTLEY.
"F. H. PEASE."

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Plaintiff's money was put into this fund by Mr. Glover who testified:

"I understood that we were paying or about to pay $50,000 for a one-fifth interest for what they had paid $30,000 for."

He also testified that the unsigned memorandum given above was correct, and, further:

"I understood that they were to increase the capital stock to $250,000; that was part of the arrangement. No more money was to be paid in to the company. We paid in $50,000 according to that memorandum for a fifth interest, and the Detroit stockholders were to have it."

Mr. Van Cleve, a witness for plaintiff, testified:

"Mr. Fisher (plaintiff) was one of the parties. He was one of the Ypsilanti parties that subscribed. He was one of the parties that was to buy one-fifth interest for $50,000."

Relative to the whole sale he testified:

"*Q.* Was the whole sale conditioned upon your raising $50,000?
"*A.* $50,000; yes, sir, that was the proposition.
"*Q.* And no separate single sale to any one individual?
"*A.* I don't know of any.
"*Q.* What is that?
"*A.* No.
"*Q.* Was it to be all one transaction—all consummated at one time?
"*A.* Yes, sir; I suppose so."

Mr. Van Cleve was the person most active in bringing about this sale and removal. He was a subscriber and resided at Ypsilanti. After the removal to Ypsilanti he became manager of the business. The allegations in the declaration relative to this sale gave no notice to defendants of the transaction proved. In considering the fraudulent representations it will not be necessary to refer to the allegations relative to increasing the capital stock, or the title to stock issued to plaintiff, because both are relied upon as implied warranties.

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It appears from the record that the only express fraudulent representation claimed by plaintiff which induced him to enter into this purchase was a certain letter written by defendant Radford to Van Cleve as follows:

"Detroit, April 25, 1892.

"J. W. VAN CLEVE,

"Ypsilanti.

"*Dear Sir:* In answer to your inquiry, will say that the Keeley Institute at Northville is now paying 12 per cent. on $250,000.

"Yours most truly,

"GEO. W. RADFORD."

Plaintiff saw this writing in the hands of Mr. Glover, and read it. The specific allegation contained in the declaration is:

"And they did further fraudulently and corruptly and with intent to cheat and defraud said plaintiff, and to induce him to buy and pay for said shares of stock, represent to said plaintiff that at the time of said sale, to wit, on the 15th day of May, 1892, and for a long time previous thereto, the net earnings of said corporation were twelve per cent. on $250,000, to wit, the sum of $30,000."

The letter relied on was sent to Van Cleve, who, as appears from the case of *Van Cleve* v. *Radford*, supra, had full knowledge of all the facts. Van Cleve had no talk with, and made no representations to, plaintiff concerning this letter, nor did any other person. The allegation of the declaration is that this representation was made directly by defendants to plaintiff. The statement of the letter is that "the Keeley Institute at Northville is now paying 12 per cent. net," etc. No statement in writing to a third person is referred to in the declaration, nor does the statement as made in the letter correspond with the allegation concerning it in the declaration. *Collins* v. *Jackson*, 54 Mich. 186; *Hubbard* v. *Long*, 105 Mich. 442, and cases cited; *Bilsborrow* v. *Warner*, 117 Mich. 506.

The proofs of fraudulent representations do not support such allegations. The variance was fatal, and could not

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be cured by amendment. The court was in error in not directing a verdict for the defendants as requested.

The judgment of the circuit court is reversed and set aside, and, as the cause of action which plaintiff's proof tended to establish is barred by the statute of limitations, no new trial will be granted.

CARPENTER, J., concurred with MCALVAY, J.

OSTRANDER, J. It was held in *Van Cleve* v. *Radford*, 149 Mich. 106, that none of the representations alleged to have been made to plaintiff were proved; which involved the finding, not that defendant Radford did not give to plaintiff a written statement—an apparent representation—that the institution at Northville was paying 12 per cent. net on $250,000, but that this statement, requested by Van Cleve, and used by him to show to others, was not, to him, a representation of the fact stated. It does not follow that it was not a representation to the plaintiff in this case upon which he had the right to and did rely, to his injury. It is true the statement is addressed to Van Cleve, who was promoting the increase of capital and the removal of the institution to Ypsilanti. It is equally true that the jury might have found from the testimony that it was made for the purpose of having it shown to those whom Van Cleve should solicit to invest money in the venture and to induce such persons to invest. It was therefore a representation made to the plaintiff by defendant Radford. The declaration sets out the representation. If plaintiff relied upon it, if he parted with his money to the defendants, and if the representation was false, it is immaterial whether his money was placed with the money of others in effecting a transfer of an interest in the institution. Stock was to be, and was in fact, issued, and plaintiff was to have and he received his proper number of shares. I am of opinion that the case is not ruled by *Van Cleve* v. *Radford*.

The fact that plaintiff was a member of the Ypsilanti syndicate is not decisive of his right to recover. I know

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of no rule of law which imputes to all of the members of a syndicate formed to purchase property the knowledge of each of the members. Van Cleve was an active promoter of the venture. He may have had knowledge of the business which the others did not possess. I do not understand that because a man induces me to invest money by untruthfully representing conditions, the fact that he also joins in the adventure makes him my agent and charges me with knowledge of a fraud in which he participates, or binds me by his knowledge that representations made to me by others are untrue. Such a rule would relieve wrongdoers if one of their number, or if a confidant, acted with those defrauded. But I concur with Mr. Justice MCALVAY in holding there was a fatal variance between the case set out in the declaration and the case proved. Counsel for appellee are clearly right when they say that all of the representations alleged need not be proved. I do not place my concurrence upon the ground that plaintiff did not prove that the false representation alleged was made and was relied upon, but upon the ground that what he and his associates were to receive for their money was not stock in the Northville concern but stock in a concern to be removed to and to be operated in Ypsilanti. The action is case for damages for fraud. It is not claimed that plaintiff would have invested in the stock of the corporation except upon the consideration that it should carry on its business at Ypsilanti. I am not able to distinguish the case upon this point from *Collins* v. *Jackson*, 54 Mich. 186.

HOOKER and MOORE, JJ., concurred with OSTRANDER, J.

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TOWNSHIP OF ECORSE v. JACKSON, ANN ARBOR & DETROIT RAILWAY.

1. STREET RAILROADS — ACQUISITION OF RIGHTS — CONSENT OF PROPERTY OWNERS.

   Where a street railroad, proceeding under Act No. 288, Pub. Acts 1901, obtained the consent of more than the necessary two-thirds of the abutting property owners without fraud, the fact that the consent of two others was obtained by fraud was not controlling.

2. EMINENT DOMAIN—USE OF HIGHWAYS—ADDITIONAL SERVITUDE — WHAT CONSTITUTES — STREET RAILROADS — RAILROADS IN STREETS.

   There is a well-defined distinction between the definitions of the words "railroad" and "street railway," the former being a word of general and extended meaning, applying to all roads incorporated under the general law, and the latter being local in its signification, referring to transportation of a character entirely different from that of a general railroad; the former has always been held to impose an additional servitude upon a public way for which the abutting owners were entitled to compensation, while the latter has been held to add no such burden.

3. STATUTES — OBJECTS AND TITLES — AMENDMENTS — HARMONY — CONSTITUTIONAL LAW—RAILROADS—STREET RAILROADS.

   Act No. 238, Pub. Acts 1901, the title of which discloses an intent to amend the general railroad law, offends section 20 of article 4 of the Constitution, requiring unity of object and title, inasmuch as it attempts to graft upon the general railroad law a section under which corporations organized under it could enjoy all the rights and benefits of street railways, and acquire franchises in the public highways without limit as to time or control by local authorities.

Appeal from Wayne; Mandell, J. Submitted January 14, 1908. (Docket No. 52.) Decided July 1, 1908.

Bill by the township of Ecorse against the Jackson, Ann Arbor & Detroit Railway and others to enjoin the construction of a railway upon a highway. From a de-

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cree dismissing the bill, complainant appeals. Reversed, and decree entered for complainant.

James H. Pound, for complainant.

Graves, Hatch & Wasey, for defendants.

MCALVAY, J. Complainant township filed its bill of complaint against the railway company, and the commissioner of highways of said township, who are the principal defendants to the suit, asking for a discovery from them to know by and under what agreement or by what right said railway claims to enter upon a highway of said township and occupy the same, and also for an injunction against them to restrain them from constructing a railway upon a certain road running through said township, and for general relief.

Defendant railway is a Michigan corporation organized under the general railroad law of the State. Application was made by it through its vice-president, who appeared before the township board, for a perpetual right of way for a street car line on Fort street boulevard in said township, such right of way to take 24 feet from the center of the highway. Objections were made to a perpetual franchise, to a T rail as proposed, and also to the proposed crossings. Nothing further was done before the board. Defendant railway proceeded to enter upon said highway and to take possession of 24 feet in the center thereof and to construct a railway thereon, laying an ordinary T rail. This it now appears was done under claimed authority of defendant highway commissioner, who, without the knowledge or consent of complainant, entered into an agreement with defendant railway authorizing it to construct such railway and to enjoy its franchise without limit as to time. This agreement was not filed or recorded until after this suit was commenced.

The authority under which the highway commissioner acted is given by Act No. 238, Pub. Acts 1901, which provides as follows:

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"SECTION 1. That article two of chapter one hundred sixty-four of the Compiled Laws of the State of Michigan of the year eighteen hundred ninety-seven, said chapter one hundred sixty-four being 'An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management, and to fix the duties and liabilities of all railroads and other corporations owning or operating any railroad in this State,' be amended by adding a new section thereto, to be known as section fifty-one, and read as follows:

"SEC. 51. When any corporation is organized under this act for the purpose of constructing, maintaining and operating a street, suburban or interurban railroad, whose cars shall be operated by motive power other than steam engines, such railroad may be constructed upon any public street, lane, alley or highway of any village on such terms and conditions as shall be agreed upon between the railroad company and the village board of such village; and such railroad may be constructed upon any public street, lane, alley or highway of any township on such terms and conditions as shall be agreed upon between the railroad company and the commissioners of highways of such township: *Provided*, The railroad company shall have obtained the consent to the construction thereof of two-thirds of the owners of property adjoining the roadbed of such railroad in such township; and if such consent from any owner cannot be obtained by agreement, then for such consent compensation shall be made by the railroad company to such owner, which shall be ascertained as herein prescribed for obtaining property or franchises for the purpose of its incorporation."

The claim of complainant that all of the signatures of owners giving consent to construction, required by statute, were fraudulently obtained is not supported by the record. Of the two instances relied upon as fraudulent, but one of them can be said to support the claim, although the testimony indicated that absolute frankness was not used in the other case. This cannot be in any way controlling, for the reason that more than the required two-thirds of the property owners were secured.

The trial court denied the relief prayed, and dismissed the bill of complaint, without costs. The first question

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raised by the complainant is, that the act under which defendant corporation claims to be authorized to enter upon and occupy the highway in question, and construct a railway thereon by an agreement with the highway commissioner, violates article 4, section 20, of the Constitution, which provides that no law shall embrace more than one object which shall be expressed in its title.

It will be seen from the entitling of the general railroad law given above in the act of 1901, that the object provided for is the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroads, and other corporations owning and operating any railroad in this State. The general railroad law in practically its present form embodied in chapter 164, 2 Comp. Laws, is the revision of 1873. Both before and since that revision, many of its provisions have been before this court for construction. Previous to 1871 the general railroad law contained no authority for the use of streets. In 1871 authority was given to lay railroads in streets under certain conditions, one of which was the payment of damages and compensation to abutting owners before occupation by the railroad. Since that time, this requirement has been upon our statute books and remains unrepealed. In recent years conditions in cities and the more densely populated communities have required methods of transportation of the inhabitants which would relieve the congestion of the streets in such places, and from these conditions has grown up the street railway system of the country. Laws have been enacted authorizing corporations to be organized for the purposes of constructing, owning, and operating these street railways. This system has in time extended to what has been called suburban and interurban railways. In this State until the enactment of the act of 1901, relied upon by defendants, the operation and construction of these street railways has not been authorized under our general railroad law. Under the laws authorizing the construction and operation of street railways before the

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act of 1901, decisions have been rendered by this court, supported by the decisions of the courts of last resort of some other States, holding that such railways constructed upon and along the public highways were not an additional servitude and that the abutting owners could not recover damages by reason of the use of such highways for that purpose. *Detroit City Ry.* v. *Mills*, 85 Mich. 634; *People, ex rel. Kunze*, v. *Railway Co.*, 92 Mich. 522 (16 L. R. A. 752); *Dean* v. *Railway Co.*, 93 Mich. 330. Judge COOLEY, in *Grand Rapids, etc., R. Co.* v. *Heisel*, 38 Mich. 62, said of a street railway:

"So far from constituting a new burden, it is supposed to be permitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established and relieves the pressure of local business and local travel instead of constituting an embarrassment. * * * It is enough that the use of the street for a city railway is a proper use and therefore a lawful use."

Upon this and similar reasoning it has been held by this court that a street railway is not an additional servitude.

The object of the amendment of 1901 was to graft onto the general railroad law a section under which corporations organized under it could enjoy all the rights and benefits of street railways, and the further right in townships to acquire franchises in the public highways without limit as to time, and without any control by the municipality as to fares, speed, and many other matters, at least as far as the provisions of the amendment are concerned; all this to be accomplished by an agreement with a highway commissioner after obtaining consent of two-thirds of the abutting owners.

The object expressed in the entitling of the act has already been stated. The object contained in this amendment is not expressed in that entitling. The amendment was not germane to the purposes of the general railroad law. No street railway was ever contemplated in and by its terms. A reading of the entitling would give no intimation of the object in the body of the amendatory act.

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There is a well-defined distinction between the definitions of the words "railroad" and "street railway." One is a word of general and extended meaning applying to all roads incorporated under the general law. The other is local in its signification, referring to transportation of a character entirely different from that of a general railroad. One has always been held to impose an additional servitude upon a public way for which abutting owners were entitled to compensation; the other, as already stated, has been held to add no such burden. The act amended did not provide for the incorporation of street, suburban, or interurban railways, as might be inferred from reading the amendment of 1901. In the *Mills Case*, supra, the writer of the majority opinion recognized the fact that the general purpose of the law then under construction (being the train railway act) was to *provide* for local transportation only, as distinguished from transportation by railroads generally.

In the *Heisel Case*, supra, Mr. Justice COOLEY distinguished between railroads and street railways. He said:

"It is, to my mind at least, doubtful whether it is competent for the public authorities to bind the interests of individuals by any consent they may give to the occupation for railroad purposes of a public highway, when the land over which the highway is laid is owned by private parties. If the railroad were only a city railway constituting a mere local convenience, and calculated to relieve the pressure of traffic and travel upon the street, the question of course would be different. * * * A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted because it constitutes a relief to the street. * * * But we cannot say the same in the case of the ordinary railroad. It is not usual for such a road to be laid in one of the public highways, and the cases in which it is permitted are exceptional. For that reason, therefore, if for no other, the owner whose land is taken for a highway * * * cannot be understood to have assented to its being appropriated * * * to railway purposes at the discretion of the

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public authorities, and to have been compensated for such appropriation. Neither can the use of the highway for the ordinary railway be in furtherance of the purpose for which the highway is established. * * * The two uses, on the other hand, come seriously in conflict; the railroad constitutes a perpetual embarrassment to the ordinary use."

This quotation is made to show the view of the learned Justice in distinguishing between them as to their objects and uses, as well as to accentuate the proposition that the object of the amendatory act was not expressed in the title of the amended act. The object of that act was to provide for the incorporation of companies to engage in State-wide transportation.

It is unnecessary to extend the discussion. Much might be said in support of the argument concerning the system of taxation and of State and municipal control of, and restrictions upon, ordinary railroads.

The question as to whether corporations organized under the general railroad act can be authorized to construct, own, or operate street railways is not before us, and we do not express any opinion upon that question. We do decide that this act of 1901 is unconstitutional and void for the reasons given, and therefore does not confer authority upon defendant corporation to do the acts complained of in this case.

The decree of the circuit court is reversed, and a decree will be entered in favor of complainant, and defendants will be perpetually enjoined from doing the acts complained of, with costs of both courts.

GRANT, C. J., and BLAIR, MOORE, and CARPENTER, JJ., concurred.

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FOSTER *v.* WATSON.

1. COURTS—DECISIONS—STARE DECISIS.
   Mere failure of the court in a decision to apply an applicable rule of law announced by previous decisions, the rule not being discussed nor considered, casts no doubt upon the correctness of the rule.

2. CERTIORARI — PROPRIETY — REVIEW OF JUSTICE'S JUDGMENT — MATTERS CONSIDERED—RULINGS ON EVIDENCE.
   Certiorari is inappropriate to review rulings of a justice of the peace on the admission of testimony of an inconclusive character, appeal being the proper remedy in such cases. MONTGOMERY, HOOKER, and MOORE, JJ., dissenting.

3. APPEAL AND ERROR—REVIEW—QUESTIONS CONSIDERED—CERTIORARI.
   On error to review the judgment of the circuit court on certiorari to review the judgment of a justice of the peace, the court will not consider a question not made in the circuit court nor presented by the affidavit for the writ of certiorari.

Error to Chippewa; Steere, J. Submitted January 20, 1908. (Docket No. 94.) Decided July 1, 1908.

Assumpsit in justice's court by Henry B. Foster against John Watson and William J. Armstrong on a promissory note. There was judgment for plaintiff, and defendants appealed to the circuit court by writ of certiorari. There was judgment affirming the judgment of the justice's court, and defendants bring error. Affirmed.

V. G. Lanning, for appellants.

Davidson & Hudson, for appellee.

CARPENTER, J. Plaintiff brought suit in justice's court to recover on a certain instrument executed and delivered by defendant. The instrument was payable to W. J. Armstrong, or order. The evidence proved plaintiff

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to be a bona fide holder. The justice held that the instrument was negotiable and he therefore excluded evidence offered by defendant tending to prove a failure of consideration, and rendered judgment in favor of plaintiff. Defendant thereupon had this judgment reviewed in the circuit court upon a writ of certiorari. He contended that the instrument sued upon was not negotiable, and therefore that the justice erred in excluding the proffered evidence. The circuit court affirmed the judgment rendered by the justice. Defendant thereupon obtained a writ of error from this court and now asks a reversal of the judgment in the circuit court and of the judgment in the justice's court.

Can defendant review the alleged error of the justice by a writ of certiorari? At most the justice erred in declining to admit the evidence proffered by defendant tending to prove failure of consideration. It cannot be said that the admission of this testimony would have resulted in a judgment in defendant's favor. The most that can be said is that defendant suffered a technical legal prejudice by the ruling complained of and the proper remedy in an appellate court would be to reverse the judgment and grant a new trial.

Can this ruling be reviewed upon a writ of certiorari? In *Howell* v. *Shepard*, 48 Mich. 472, this court decided that a ruling of a justice erroneously admitting in evidence a certain deposition could not be reviewed by certiorari, saying:

"If the defendant considered himself wronged by its reception, he should have appealed. The remedy by certiorari is not one to be encouraged when the alleged errors are such as might have been obviated on a trial de novo in the circuit."

Preceding the above quotation there is in the opinion this sentence:

"The deposition does not appear in the return, and may, for anything that does appear, have been of no moment in the case."

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From this and from the language above quoted, Justice MONTGOMERY says the opinion "plainly implies that had it appeared that the deposition was of a character which worked an injury to the plaintiff in certiorari, the court would have felt bound to review the ruling." I think this is fully answered by the statement in the opinion: "If the defendant considered himself wronged by its reception, *he should have appealed.*"

In *Erie Preserving Co.* v. *Witherspoon*, 49 Mich. 377, in an opinion of this court by Justice COOLEY, it is said:

"Of the fifteen errors assigned in the affidavit for certiorari, fourteen relate to the rulings of the justice on the admission of evidence. In nearly every case the point made is somewhat nice and there is no reason to doubt that the justice decided according to his best judgment. We do not discover that any evidence was excluded which could have aided the defendants, or any received that was clearly improper. It is probable that on some points the case was not very completely made out, but none of the objections taken were such as would necessarily defeat the plaintiff's recovery, though if sustained, some of them might have rendered further proofs essential.

"Where the alleged errors of the justice go to the foundation of the action, it is proper to review them on certiorari; but where they occur in the course of the trial, and are of such a nature that they might be obviated on a new trial, a new trial is obviously the proper remedy. The writ of certiorari is not given to enable parties to have a technical review of all the justice's rulings, but to afford a speedy and inexpensive remedy for substantial faults; and where the case is one to be determined on disputed facts, the party dissatisfied with the judgment should remove it to the circuit court for trial on the facts, instead of seeking a reversal on technical grounds without an investigation of the merits. *Ritter* v. *Daniels*, 47 Mich. 617. It is not the policy of the law to encourage a choice of remedies that tends to multiply litigation, and to make judgments depend upon something else than a consideration of the real merits in controversy.

"We think the circuit court should not have reversed the justice's judgment, and its judgment must be set aside and that of the justice affirmed."

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In *Galloway* v. *Corbitt*, 52 Mich. 460, this court, speaking through Mr. Justice CHAMPLIN, said:

"This court has heretofore expressed its disapprobation of the practice of taking advantage of technical errors in the proceedings before justices of the peace, by the process of certiorari, thus converting what was designed to be a speedy and inexpensive court for the trial of causes into a costly and dilatory tribunal, and often in its practical operation, through serious delays, defeating the ends of justice; and we are of opinion that except for errors which go to the foundation of the action, the proper remedy is by appeal," citing *Erie Preserving Co.* v. *Witherspoon*, supra.

In *Morrison* v. *Emsley*, 53 Mich. 564, upon a writ of certiorari, the circuit court reversed a judgment rendered for the defendant in justice's court because of an erroneous ruling excluding testimony tending to prove that plaintiff was an infant at the time he entered into the contract involved in the suit. The case was then brought to this court by writ of error, and the judgment of the circuit court was reversed. The unanimous opinion of the court was written by Justice CAMPBELL. The opinion, after stating that the ruling of the justice was erroneous, proceeds:

"Had the testimony concerning the age of plaintiff been received and retained, it by no means follows that the justice would have been bound to give it full credit, or that defendant might not have contradicted it. There were circumstances sworn to by plaintiff which threw doubt upon it. * * * The fact of age would have been open to dispute.

"If such an error had been committed in a circuit court, the only result would have been a new trial, when all these matters could be litigated. But when a justice's judgment is reversed on certiorari the whole case falls, whereas on appeal the appealing party will prevail at the circuit on a trial of the facts if he makes out his case, but the adverse party also has a fair chance to meet that case.

"It is not the proper office of a certiorari to reverse proceedings on defects which are not calculated to reach the substance of the controversy. The statute contem-

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plates that on a certiorari from a justice the appellate court may do substantial justice on the whole merits. But this is impossible where the reversal is for the exclusion of testimony which is not of a conclusive character. And it may easily happen that a reversal in such a case may be had, to a destruction of justice, by loss of remedies, or other circumstances of prejudice. While there may not be an absence of jurisdiction to issue a writ in such cases, it is usually a bad practice, and should not be encouraged unless circumstances are exceptional. The conditions of appeal are as readily performed as those of certiorari and the remedy is far more appropriate."

It is true, as stated by Justice MONTGOMERY, the opinion in *Morrison* v. *Emsley* pointed out another ground for reversing the judgment of the lower court, viz., an irregularity in the service of the writ of certiorari. But of that the court said: "We are not disposed to decide the case on this merely technical ground," and then proceeded to state what is above quoted. I submit that under these circumstances I am warranted in maintaining that the real ground upon which that decision rests is that a writ of certiorari is not the proper writ in which to review rulings of a justice of the peace excluding testimony not of a conclusive character.

In *Gray* v. *Willcox*, 56 Mich. 58, in an opinion delivered by Justice CHAMPLIN, it is said:

"All of the objections taken by defendant in the course of the proceedings were exceedingly technical, and did not involve the merits of the controversy, and if they should be held legal and valid would not determine the rights of the parties in the subject-matter of the suit, but would merely turn the party over to another action. In such cases, we think the party who feels aggrieved at the result of the trial should, if he desires to remove the case to the circuit court, take it there by appeal instead of certiorari."

In *Mann* v. *Tyler*, 56 Mich. 564, Chief Justice COOLEY, speaking for the court, said:

"Certiorari, in cases which stand upon facts, is a remedy not favorable to justice, because it may set aside a

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righteous judgment upon errors more technical than substantial."

In *Stoll* v. *Padley*, 98 Mich. 13, it was said by the court, speaking through Mr. Justice MONTGOMERY:

"We think none of the alleged errors went to the jurisdiction of the justice. It may prove of little avail to repeat what the court has so frequently said,—that the more appropriate remedy in such cases as the present is by appeal. [Citing cases.] Undoubtedly, the party has a right to resort to certiorari, but if he does he must do so at the risk of failing to 'hit the bird in the eye' and at the risk of losing a trial on the merits in case of such failure."

Opposed to the foregoing decisions is *Whittle* v. *Bailes*, 65 Mich. 640. There this court held that certiorari was the proper remedy to review a ruling of a justice of the peace improperly excluding testimony offered by the defendant. That opinion was delivered by Justice CHAMPLIN, and respecting the point in question, he states:

"It is also claimed that the circuit judge erred in reversing the judgment, inasmuch as if the proffered evidence had been received it was not indisputably conclusive, nor would it have changed the result of the judgment before the justice. * * * Had he [defendant] shown all he attempted to, it may not have changed the results before the justice, but it ought to have done so, and doubtless would, as it is to be presumed that the justice was a conscientious, upright magistrate."

This opinion contains no reference whatever to the opposing cases heretofore cited, nor to the doctrine therein announced, and to reconcile it with those cases and their underlying principle is an impossible task. *Whittle* v. *Bailes* decides this proposition, viz., that an erroneous ruling of a justice refusing to admit testimony proffered by the defendant party—and which is claimed by him would establish his right to recover if he be plaintiff, or his defense if he be defendant—may be redressed by a reversal of the judgment upon a writ of certiorari. In such a case and in all such cases it cannot be known either in

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the justice's court or in the appellate court what would have been proved by the testimony which was proffered and excluded. It cannot be known and it cannot therefore be said that the excluded testimony was of a conclusive character. *Whittle* v. *Bailes* is therefore in direct conflict with *Morrison* v. *Emsley*, 53 Mich. 564, heretofore referred to. For there it was decided that a writ of certiorari could not be used to review a ruling "for the exclusion of testimony which is not of a conclusive character." It is also in conflict with the ruling laid down in many of the other cases heretofore cited, viz., that certiorari is not the remedy where "the alleged errors are such as might have been obviated on a trial in the circuit." This court must then overrule either *Whittle* v. *Bailes* or *Morrison* v. *Emsley* and the line of cases which supports the rule it applies. There is little difficulty in making our choice. The rule governing *Morrison* v. *Emsley* was deliberately adopted. It was a wise rule and in the interest of justice. The effect of using a writ of certiorari to redress errors which might be obviated by a new trial would convert "what was designed to be a speedy and inexpensive court for the trial of causes into a costly and dilatory tribunal, and often in its practical operation, through serious delays, defeat the ends of justice." Nor can we impute to the learned Justices who participated in deciding *Whittle* v. *Bailes* the intention of changing this rule. Had they intended to overrule these cases they would have referred to them. It is rather to be inferred that *Whittle* v. *Bailes* was hastily and inconsiderately decided. (It was argued April 12, 1887, and decided April 28, 1887.) There the court made an unintentional departure from the established rule.

It is said that *Whittle* v. *Bailes* is sustained by other decisions of this court. We are referred to *Drovers' Nat. Bank* v. *Blue*, 110 Mich. 31; *Boatz* v. *Berg*, 51 Mich. 8; and *Eldridge* v. *Hubbell*, 119 Mich. 61. We will examine these cases. The most that defendant can claim for *Drovers' Nat. Bank* v. *Blue* is that the court

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failed to apply the rule. The rule, however, was not discussed or considered. Neither the case of *Whittle* v. *Bailes* nor *Morrison* v. *Emsley* was referred to. Under these circumstances that decision casts no doubt upon the correctness of the rule. See *Andrews* v. *Booth*, 148 Mich. 333, and authorities there cited.

Boatz v. *Berg*, 51 Mich. 8, and *Eldridge* v. *Hubbell*, 119 Mich. 61, are much alike. In each of these cases the ruling of the justice complained of—and which it was held might be reversed by certiorari—deprived the defeated party of the kind of trial he was entitled to have. In *Boatz* v. *Berg*, the justice improperly refused to give the defeated party a trial by jury. In *Eldridge* v. *Hubbell*, the justice by an improper ruling—a ruling giving the prevailing party the right to a peremptory challenge of jurors—deprived the defeated party of a trial by the jury to which he was entitled. It was held—and reluctantly held—that this ruling might be reviewed by writ of certiorari. I do not understand that it was intended in *Eldridge* v. *Hubbell* to overrule *Morrison* v. *Emsley*, and the line of cases supporting the principle therein declared. I do not understand that it was decided in *Eldridge* v. *Hubbell* that the rulings of a justice made in the course of a trial might be reviewed by writ of certiorari. I understand that it was merely decided, as there stated, "a question of this nature"—that is, decisions of the justice which deprived the defeated party of the kind of trial he is entitled to have—"may be reviewed by certiorari." Construing *Eldridge* v. *Hubbell* in accordance with this understanding, it has no relation to the case at bar, and the same may be said of *Boatz* v. *Berg*, in which case the propriety of reviewing the ruling by writ of certiorari was not discussed.

There is also a line of cases commencing at a very early date and continuing to the present time (see *Cicotte* v. *Morse*, 8 Mich. 424; *Berry* v. *Lowe*, 10 Mich. 9; *Chicago, etc., R. Co.* v. *Peters*, 45 Mich. 636; and *Bullock* v. *Ueberroth*, 121 Mich. 293) which hold that when the

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plaintiff has entirely failed to prove his case a judgment rendered in his favor by the justice will be reversed by certiorari. It may be suggested that since in such cases the failure of proof may be generally obviated by a new trial, it should have been held within the rule stated in this opinion that the proper remedy was appeal and not certiorari. Perhaps this is true. If so, it only proves that the court did not extend said rule to its logical consequence. This does not, however, justify our denying the rule altogether and declaring that it does not apply in cases where the court has authoritatively determined it does apply. We must therefore distinguish—and I think there is a distinction—between cases where plaintiff has entirely failed to prove his cause of action and cases where testimony not of a conclusive character is excluded. The one class may be reviewed by certiorari; the other cannot.

The only case therefore that presents a serious obstacle to our following *Morrison* v. *Emsley*, and the rule there approved, is *Whittle* v. *Bailes*. For reasons heretofore stated, the latter case must be overruled and the rule observed. That rule required defendant to seek relief by appeal and not by certiorari. By seeking relief by certiorari he chose the wrong remedy and cannot obtain relief.

The point is also made that within the rule of *Cicotte* v. *Morse* and *Bullock* v. *Ueberroth*, supra, the judgment is erroneous, because there was no evidence to support it. This point was not made in the circuit court and it was not raised in the affidavit for the writ of certiorari. We cannot therefore consider it. *Drake* v. *Harvester Co.*, 150 Mich. 561.

The judgment is affirmed.

GRANT, C. J., and BLAIR, OSTRANDER, and MCALVAY, JJ., concurred with CARPENTER, J.

MONTGOMERY, J. I regret that I am unable to agree with the opinion of my Brother CARPENTER. I regret this all the more for the reason that I would be very glad to see the remedy of certiorari circumscribed and limited

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as his opinion would result in limiting it. But I cannot agree that the prior decisions of the court should be interpreted as having denied the right to review by certiorari a ruling of the character involved in the present case. Were we dealing with the question with plenary power to fix the rule, I should not hesitate to declare in favor of a rule that would compel resort to the remedy by appeal in all cases where the defeated party might by a retrial in the circuit have a determination of his rights. But admittedly no such broad rule as that has ever been established by the court, and there is a multitude of cases in which resort has been permitted to review by certiorari rulings which might have been corrected by a new trial in the circuit.

The first case cited by Mr. Justice CARPENTER is *Howell* v. *Shepard*, 48 Mich. 472. I do not construe this case as holding that the rulings which exclude testimony which goes to the merits of the case may not be had upon certiorari. On the contrary, I think the exact opposite is implied. The error relied upon was error in admitting in evidence a deposition which was taken on insufficient notice. It was said:

"The deposition does not appear in the return, *and may, for anything that does appear, have been of no moment in the case.* If the defendant considered himself wronged by its reception, he should have appealed. The remedy by certiorari is not one to be *encouraged* when the alleged errors are such as might have been obviated on a trial de novo in the circuit, and nothing will be taken by intendment in favor of errors assigned upon it."

I think this plainly implies that had it appeared that the deposition was of a character which worked an injury to the plaintiff in certiorari, the court would have felt bound to review the ruling.

So in *Erie Preserving Co.* v. *Witherspoon*, 49 Mich. 377, in referring to the rulings on the admission of testimony, it was said:

"We do not discover that any evidence was excluded

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which could have aided the defendants, or any received that was clearly improper. It is probable that on some points the case was not very completely made out, but none of the objections taken were such as would necessarily defeat the plaintiff's recovery, though if sustained, some of them might have rendered further proofs essential."

It was with reference to this state of facts that the holding was made, and it was said:

"It is not the policy of the law to encourage a choice of remedies that tends to multiply litigation, and to make judgments depend upon something else than a consideration of the real merits in controversy."

So in *Galloway* v. *Corbitt*, 52 Mich. 460. The error assigned was that the justice had entered the jury room and advised the jury during its deliberations. The court say:

"We have here, from the justice's return, a statement of all that occurred, and in passing upon this question we must take his return as true. We cannot say that it was an error that prejudiced the rights of the defendant."

It will be seen that the court actually dealt with the error assigned while availing itself of the opportunity to again reiterate that a more appropriate remedy would have been an appeal to the circuit court where the case could have been tried and determined upon its merits. The court again expressed its disapprobation—

"Of the practice of taking advantage of technical errors in the proceedings before justices of the peace, by the process of certiorari, thus converting what was designed to be a speedy and inexpensive court for the trial of causes into a costly and dilatory tribunal, and often in its practical operation, through serious delays, defeating the ends of justice; and we are of opinion that except for errors which go to the foundation of the action, the proper remedy is by appeal."

This is not inconsistent with a review of an error which excludes offered testimony which goes to the merits of the case.

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In *Morrison* v. *Emsley*, 53 Mich. 564, the court first determined that the writ of certiorari was not served within the time required by statute, and that the circuit court should have dismissed the writ for the reason that the irregularity was sufficient and the case entirely wanting in merits. It was said:

"The statute contemplates that on a certiorari from a justice the appellate court may do substantial justice on the whole merits. But this is impossible where the reversal is for the exclusion of testimony which is not of a conclusive character. And it may easily happen that a reversal in such a case may be had, to a destruction of justice, by loss of remedies, or other circumstances of prejudice. *While there may not be an absence of jurisdiction to issue a writ in such cases, it is usually a bad practice, and should not be encouraged unless circumstances are exceptional.* The conditions of the appeal are as readily performed as those of certiorari and the remedy is far more appropriate.

"*In the present case, whatever may be plaintiff's rights, if he really was a minor, there is nothing on the record to indicate that he could insist on them honorably. The case does not appeal to indulgence.*"

It will be noted that it was only by an indulgence of the court that the case could have been reversed on the ground of the exclusion of testimony in this case, as the plaintiff in certiorari had failed to serve his writ within the time fixed by the statute.

So in the case of *Gray* v. *Willcox*, 56 Mich. 58, the court reviewed at length the rulings of the justice of the peace on the admission of testimony, finding in effect that no prejudicial error had been committed, and after stating that the objections taken by the defendant did not involve the merits of the controversy, and that if they should be held legal and valid they would not determine the rights of the parties in the subject-matter of the suit, but would merely turn the parties over to another action, and that in such case the party who feels aggrieved should resort to appeal instead of certiorari, it was said:

"If, instead of appeal, the party resorts to certiorari,

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the law contemplates that all technical omissions, imperfections, or defects in the proceedings before the justice, which do *not affect the merits*, will be disregarded, and judgment will be entered as the right of the matter may appear. * * *

"In this case the circuit court held that there appeared no error affecting the merits of the controversy between the parties either in the record and proceedings or in the giving of judgment, and therefore affirmed the same."

This was by no means holding that the court would not review the rulings in a case if they were such as to affect the merits.

In *Mann* v. *Tyler*, 56 Mich. 564, testimony was given by the defendant on the trial of the case in which he sought to show that the note sued upon was for too large a sum, and that he had made previous payments on account of the transaction which should have been deducted before the note was given. Testimony is quoted showing that he knew of all the claims he then made before the note was given, and made no answer to the question as to whether the note was given for the balance found due on the purchase of the piano. The plaintiff then moved to strike out the testimony, which motion was allowed. It is significant that the court said:

"Had he been trying *the case with a jury*, it would have *been erroneous*, because it would have taken the evidence *entirely away from the jury;* but he was sitting alone, and the evidence was addressed only to him. When he struck it out as immaterial, he merely decided in effect that it had no important bearing in the case, and ought therefore to be disregarded; and if he returns the facts truly, we cannot say he erred. Presumptively, the note was given for the actual balance due, and defendant did not state facts in his evidence which would overcome this presumption."

The court further said:

"The return as actually made by the justice shows no ground of error on which, in our opinion, we should be warranted in reversing his judgment. If it is reversed, therefore, it must be either because the circuit court re-

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fused to require a further return, or upon the grounds alleged or suggested in the last assignment of error."

But holding that these were not permissible, the court said:

"Certiorari, in cases which stand upon facts, is a remedy not favorable to justice, because it may set aside a righteous judgment upon errors more technical than substantial. *For this reason intendments should be against error on doubtful facts; not in favor of it. The remedy more conducive to justice manifestly is an appeal.*"

This, again, is far from saying that a remedy by certiorari is not open.

In *Stoll* v. *Padley*, 98 Mich. 13, after citing these cases and condemning the practice of resorting to certiorari when appeal is open, the court said:

"Undoubtedly, the party has a right to resort to certiorari, but if he does he must do so at the risk of failing to 'hit the bird in the eye,' and at the risk of losing a trial on the merits in case of such failure."

This certainly does not support the view that certiorari is not a remedy open to the party. It is but another way of asserting again that when certiorari is resorted to, intendments would be in favor of the ruling of the justice.

It appears to be conceded that the case of *Whittle* v. *Bailes*, 65 Mich. 640, is an authority directly in point. That case holds that the exclusion of evidence proper to be considered which goes to the merits of the case may be alleged as ground of error on certiorari. It is suggested in the opinion of Mr. Justice CARPENTER that this opinion was perhaps not well considered, and that *Morrison* v. *Emsley* was overlooked. I think there are abundant reasons why this should not be said: *First*, I have endeavored to point out that *Morrison* v. *Emsley* is not necessarily in conflict with *Whittle* v. *Bailes; second*, Mr. Justice CHAMPLIN, who wrote the opinion in *Whittle* v. *Bailes*, participated in the decision of *Morrison* v.

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Emsley, as did the other members of the court who signed his opinion; *third*, an examination of the briefs in the case discloses that a distinct point was made that this question ought not to be reviewed on error for the reason that the evidence, had it been received, would not have been indisputably conclusive. And in the brief, *Howell* v. *Shepard*, *Erie Preserving Co.* v. *Witherspoon*, *Galloway* v. *Corbitt*, and *Morrison* v. *Emsley* (cited as *Morrison* v. *Crezley*, 53 Mich. 564) were all cited, and it is to be presumed were considered by the court.

Drovers' Nat. Bank v. *Blue*, 110 Mich. 31, was a case in which the precise question involved was whether there was error in excluding testimony, and this question was reviewed on certiorari. It is true the question of remedy was not discussed, but the exercise of jurisdiction in harmony with the ruling in the earlier cases is clearly some evidence of what the court conceived the proper practice to be.

So in *Eldridge* v. *Hubbell*, 119 Mich. 61, the court again expresses its regret that certiorari is open to review questions which might be raised by appeal. The court say:

"We regret to say that, under the rules early established, a question of this nature may be reviewed by certiorari. [Citing cases.] We say we regret the existence of this rule for the reason that we are convinced that the remedy by appeal is ample in all cases where jurisdiction of the cause is obtained by the justice. We have, in numerous cases, pointed out that appeal is the better remedy. But, in the absence of legislative restriction, we can go no further than to require that, if the aggrieved party resorts to certiorari, he make the error to appear affirmatively and clearly."

Among the cases cited to sustain this holding was *Whittle* v. *Bailes*, 65 Mich. 640. If we could not, except by main strength, deny the existence of the remedy in that case, I cannot understand why we should do it now. It is suggested that it was probably not intended in *Eldridge* v. *Hubbell* to overrule *Morrison* v. *Emsley*,

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supra, and the line of cases supporting the principle therein declared. It was certainly not the purpose to overrule those cases, but it was the purpose to construe the previous holdings of the court, a feat which I think was successfully accomplished in *Eldridge* v. *Hubbell*.

In principle, the cases of *Cicotte* v. *Morse*, 8 Mich. 424, *Berry* v. *Lowe*, 10 Mich. 9, *Chicago, etc., R. Co.* v. *Peters*, 45 Mich. 636, and *Bullock* v. *Ueberroth*, 121 Mich. 293, are in point. In each of these cases, a review was had by certiorari of rulings of the justice which might have been remedied by a new trial on appeal. There is no fair distinction between a case in which the plaintiff has wholly failed to make out a case by his testimony and yet secured a judgment, as in *Bullock* v. *Ueberroth*, supra, and one in which the defendant has been prevented from defeating the plaintiff's case by an erroneous ruling of the justice and the plaintiff *thus* obtains a judgment, as in the present case. The real question is whether there is a legal right to review by certiorari a ruling of the justice which might more appropriately be considered, perhaps, by an appeal on the merits of the case. That the practice has obtained through all the court's history of reviewing such rulings, subject only to the limitation that the burden is put upon the plaintiff in certiorari to make the error *appear clearly*, and that nothing will be taken in his favor *by intendment*, I think I have demonstrated.

HOOKER and MOORE, JJ., concurred with MONTGOMERY, J.

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RICHARDS *v.* WALTZ.

1. ANIMALS — KILLING ANIMALS — CUTTING ICE — BARRICADING OPENINGS—STATUTORY DUTY—EFFECT OF NEGLECT.

   Act No. 221, Pub. Acts 1899, making it the duty of ice cutters to barricade openings in the ice, was not intended to protect or prevent injury to unattended animals, and does not create a liability in favor of the owner of a cow allowed to go unattended to a lake to drink and drowned in an unprotected hole in the ice made by defendant. CARPENTER, MONTGOMERY, and MCALVAY, JJ., dissenting.

2. SAME—CONTRIBUTORY NEGLIGENCE.

   Where plaintiff knew that ice was being cut in a lake near his home, and presumably knew the character of the barricade required by the statute to be erected about the cutting, he was not free from negligence in allowing his cattle to go to the lake unattended to drink. CARPENTER, MONTGOMERY, and MCALVAY, JJ., dissenting.

Error to Muskegon; Sessions, J. Submitted January 21, 1908. (Docket No. 103.) Decided July 1, 1908.

Case by Louis Richards against Fred Waltz and others for the negligent killing of plaintiff's cow. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Affirmed.

Cross, Lovelace & Ross, for appellant.

Turner & Turner, for appellees.

HOOKER, J. The plaintiff is a resident of the unincorporated village of Twin Lake, which is upon the east shore of a body of water called Twin Lake, and some of the streets of which are said to run to the shore of the lake. He was the owner of some cows. In conformity to his daily practice, he turned these cows and a horse into the highway, about ten o'clock in the forenoon, and paid no

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further attention to them until about half past twelve, when he heard that one was drowned in the lake at a place where the defendants had made a hole by cutting and removing ice.

The plaintiff testified that he and others had been in the daily habit of opening drinking holes through the ice at the edge of the lake in the village, and he testified that he turned his animals out to water them at the lake about 40 rods from his house. He stated that he knew it to be the habit of people generally to gather ice from this lake every winter, and that parties cut ice every winter at the place where the cow was drowned, and he knew that they were cutting there that winter, though he had not been down there, and he knew it when he let the cow out. The cow was drowned at a point some 80 rods from the premises of the plaintiff. The cow did not go upon the lake at the drinking place, but, as plaintiff stated, left the highway and crossing private property owned by one Duff, about five rods, went upon the lake, and thence four rods further to the place of drowning, which was at least 40 rods distant from the drinking place. He said that at the time he let the cows out he "did not go down to inspect the hole where they were cutting ice, he paid no attention to it." He did not testify that he supposed barricades were up, or even that he did not understand that they were not up, so far as we can discover from the record.

There are two counts in this declaration, one an ordinary common-law count for negligence, and the other pleading the statutory duty of erecting barricades, etc., i. e., Act No. 221, Pub. Acts 1899. So far as the first count is concerned, if it can be said that the acts of defendants would be negligence in the absence of the statute, which we doubt, the conduct of the plaintiff in turning out his cows, and leaving them to stray where they pleased, amounted to contributory negligence under the rule of the following cases. *Robinson* v. *Railroad Co.*,

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79 Mich. 323; *Niemann* v. *Railroad Co.*, 80 Mich. 199; *Wright* v. *Railway Co.*, 12 N. Dak. 159.

It is clear, however, that the defendants failed to perform the statutory duty of erecting barricades, and it is urged that an action for negligence may rest upon that in a proper case, although the act does not expressly provide for it, as some statutes do.

It was entitled:

"An act to compel parties engaged in securing ice to erect suitable danger signals and barricades, designating what officials it shall be the duty of to see that the provisions of this act are complied with," etc.

"SECTION 1. That it shall be the duty of any person or persons who are, or who hereafter may be, engaged in the procuring of ice from any of the streams, ponds or lakes of this State to erect, or cause to be erected, place, or caused to be placed, at or near all places where they shall be cutting ice, suitable danger signals and barricades. Such barricades shall consist of cross bars upon which a pole, rope, chain or rail shall be laid at a height not less than three feet above the ice and shall be placed not less than ten feet from the edge of the opening.

"SEC. 2. It shall be the duty of the harbor-master at all places where there is such an official having control of a stream or lake within this State, and where there is no such an official having control as aforesaid, it shall be the duty of the supervisor or other assessing officer in whose assessment district such stream or lake is situated, to see that the provisions of section one of this act are complied with.

"SEC. 3. Any person or persons who shall neglect or refuse to comply with the provisions of this act shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by imprisonment in the county jail not more than three months, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment, in the discretion of the court."

It is apparent from the title and provisions of this act that it did not contemplate an effective barricade against animals, for small animals could easily go under it, and a slight effort would throw it down, and we feel justified in saying that the act was not designed to so change the

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law of negligence as to impose a liability for animals which should wander upon streams and lakes and be drowned. We are also of the opinion that plaintiff's contributory negligence is a complete defense. We do not overlook the cases of *Flint, etc., R. Co.* v. *Lull*, 28 Mich. 510; *Parker* v. *Railway Co.*, 93 Mich. 607; and *La-Flamme* v. *Railway Co.*, 109 Mich. 511, all of which were based upon statutes giving a right of action and which rest upon a reason given by Mr. Justice COOLEY in the case of *Flint, etc., R. Co.* v. *Lull*, 28 Mich. 514. He also states that if the case had been a common-law action, contributory negligence would be a defense. This distinction is consistent with the authorities cited in the *Lull Case.*

We do not discuss some other questions raised, as they are not necessary to a decision of the case.

The judgment should be affirmed.

OSTRANDER, J. I think the judgment should be affirmed upon the ground that the statute was not designed to protect, or to prevent injury to, unattended animals.

"It may be stated as a general proposition—though there may be difficulty in some cases in applying it—that the violation of a statute or municipal ordinance is not of itself a cause of action grounded upon negligence in favor of an individual, unless the statute or ordinance was designed to prevent such injuries as were suffered by the individual claiming the damages, and often not then, the question depending upon judicial theories and surmises." 1 Thompson on Negligence, § 12.

The duty imposed, under penalty, by the statute, Act No. 221, Pub. Acts 1899, upon persons engaged in procuring ice from any of the streams, ponds, or lakes of this State is to erect, or cause to be erected, place or cause to be placed, at or near all places where they shall be cutting ice,

"Suitable danger signals and barricades. Such barricades shall consist of cross bars upon which a pole, rope,

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chain or rail shall be laid at a height not less than three feet above the ice and shall be placed not less than ten feet from the edge of the opening."

The legislature has not indicated the danger signal which will be "suitable." It is not easy to describe or even to imagine one which would deter cattle, turned out in the winter to find water for themselves, from going upon the ice of convenient ponds or streams in search of it. It is reasonably certain that the statute barricade would not prevent the passage of a thirsty animal to water.

Plaintiff turned out his cattle, unattended, to go to the lake for water as they had been accustomed to do. How his cow got into the hole from which ice had been cut does not appear. The testimony warrants the inference that it was in an attempt to drink quite as well as it warrants any other inference of the cause of her drowning. While it was customary for some one to cut holes in the ice each morning, at which cattle might drink, it does not appear that these holes were open on the morning in question. If the purpose of the statute was doubtful, plaintiff, who knew that ice was being harvested at the lake and who may be supposed to have known the character of the statute barricade, has not shown that his conduct was free from negligence.

GRANT, C. J., and BLAIR and MOORE, JJ., concurred with OSTRANDER, J.

CARPENTER, J. (*dissenting*). Plaintiff resides about 80 rods from Twin Lake in the county of Muskegon. March 1, 1905, he turned his cows, three in number, in the public highway in order that they might go and drink at said lake. The highway ran along the edge of the lake. At this point—which was 40 rods from plaintiff's house—it was expected that the cows would drink at holes cut through the ice for that purpose. About 40 rods farther away defendants had been cutting ice. The opening from which they had cut the ice was not

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barricaded by them as required by Act No. 221 of the Public Acts of 1899. One of plaintiff's cows wandered to this opening and in some way fell in and was drowned. She did not reach this opening, as she might have done, by going upon the lake at the drinking place, but by leaving the highway, crossing the land of one Duff for five rods and thence walking on the lake about four rods to said opening. It should also be stated that the lake was meandered; that defendants owned no property adjacent thereto, and that a resolution of the board of supervisors of Muskegon county, passed pursuant to section 5607, 2 Comp. Laws, authorized cattle to run at large in the public highway.

Plaintiff brought this suit in justice's court to recover compensation for the loss of his cow. It was tried by a jury and a verdict of six cents rendered in plaintiff's favor. Plaintiff appealed to the circuit court. It was there tried before a jury and a verdict rendered in defendant's favor by direction of the court. Plaintiff asks us to reverse the judgment entered on said verdict. Three questions are raised:

First. Did the failure of defendants to erect barricades violate any duty they owed to plaintiff?

Second. If so, was the neglect to comply with that duty the proximate cause of plaintiff's damages?

Third. Was plaintiff guilty of contributory negligence?

We proceed to consider these questions separately.

First. Did the failure of defendants to erect barricades violate any duty they owed to plaintiff? This depends upon the proper construction of the statute, Act No. 221 of the Public Acts of 1899. That statute makes it the duty—

"Of any person or persons who are, or who hereafter may be, engaged in the procuring of ice from any of the streams, ponds or lakes of this State to erect * * * danger signals and barricades. Such barricades shall consist of cross bars upon which a pole, rope, chain or rail shall be laid at a height not less than three feet above the

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ice, and shall be placed not less than ten feet from the edge of the opening."

Neglect or refusal to comply with the provisions of this act is made a misdemeanor punishable by fine and imprisonment. The learned trial judge held that the statute "is designed for the protection of the entire public and not for the protection of individuals." We cannot agree with him. As a general proposition it may be said that a statutory duty is a duty toward every individual likely to be injured by its nonobservance, and one so injured has a right of action. We think it may be said in this case, as was said by the Supreme Court of the United States in a somewhat similar case (*Hayes* v. *Railroad Co.*, 111 U. S. 228):

"The duty is due * * * to the public considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery."

See, also, *Deneen* v. *Railway Co.*, 150 Mich. 235; *Jetter* v. *Railroad Co.*, 2 Keyes (N. Y.), 162; *Akers* v. *Railway Co.*, 58 Minn. 540; *McRickard* v. *Flint*, 114 N. Y. 222. This case is within the principle of *Stowell* v. *Standard Oil Co.*, 139 Mich. 18. Indeed that case goes further than this, for there we held that the statute making it unlawful to sell rejected or condemned oil, or oil that had not been legally inspected, created a duty not only toward the direct purchaser, but also toward a consumer who bought from said purchaser, and a judgment in favor of such a consumer was there affirmed upon the ground (see Pollock on Torts [Webb's Am. Ed. p. 24]):

"The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury."

The case of *Taylor* v. *Railroad Co.*, 45 Mich. 74, is exceptional and is not opposed to the principles of this opin-

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ion. There it was held that an ordinance imposing upon property owners an obligation to repair the sidewalk adjacent to their premises and "to remove snow and ice therefrom" and "to keep the same free from obstruction and incumbrances" did not create a duty toward individuals, and therefore that plaintiff, who was injured in consequence of a failure to remove such snow and ice, had no cause of action. The reasoning of the court, briefly stated, was as follows. The purpose of the ordinance was to promote the convenience as well as the safety of individual travelers; if such travelers could recover damages for injury arising from an unsafe walk, they could also recover damages if a total obstruction of the walk diminished their comfort, and as these latter damages could not be recovered, neither could the former. It is clear that this reasoning has no application to the case at bar.

Since preparing this opinion, I have been served with an opposing opinion written by Justice OSTRANDER, in which he denies that the statute gave plaintiff a cause of action. His reasoning rests upon two grounds:

1st. The assumption that the cow fell in the opening in attempting to drink. This, it seems to me, can be most appropriately discussed under the second heading in this opinion, and it will there be discussed.

2d. "That the statute was not designed to protect or to prevent injury to unattended animals."

The design or purpose of the statute is to be inferred from its language. What mischief was its observance calculated to prevent? Would the observance of the statutory requirement "to place a barricade consisting of cross bars upon which a pole, rope, chain or rail shall be laid at a height of not less than three feet above the ice and at a distance not less than ten feet from the edge of the opening" tend to keep domestic animals from being drowned in the opening? If it would, then we may attribute to the legislature by the enactment of this law the purpose of protecting such cattle. Undoubtedly such a barricade would afford insufficient protection to unruly

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cattle. But, on the other hand, it seems to me equally clear that it would afford protection to ruly and docile cattle. We may take judicial notice that barricades no stronger than this often serve that purpose. It is suggested by Justice HOOKER that the barricade would be ineffectual to stop the passage of small animals. This is true, for sheep and swine will easily pass under a barricade three feet above the ice. This suggestion is important if it may be said that because the barricade would be altogether ineffectual to stop the passage of sheep and swine, it should be inferred that it was not intended to stop the passage of cattle. If this inference cannot be drawn, the suggestion is unimportant. I do not think this inference can be drawn. We may take judicial notice that there is much less likelihood of sheep or swine going unattended in winter than there is of cattle or horses. And therefore it is not to be inferred that the legislature did not intend to protect cattle because they failed to provide for the protection of sheep and swine. I therefore think that we should say that one of the purposes of the statute was to prevent injury to unattended cattle. I regard as unimportant the circumstance that, before reaching the opening in the ice, plaintiff's cow had trespassed on the land of one Duff. It is sufficient to say that when she reached the opening she was not trespassing on any rights of defendants, and the statute imposed upon them the obligation to have barricades for the purpose of preventing her being drowned.

Second. Was the failure of defendants to barricade the opening the proximate cause of plaintiff's loss? Though it is true, as the trial judge said, "there is no proof showing that if there had been such a barrier as the statute requires that that would have prevented this cow from getting into the holes in the ice," an inference that it would could have been legitimately drawn, and the question should therefore have been submitted to the jury. *Hayes* v. *Railroad Co.*, supra, is a case in point. There the defendant railroad company had neglected to fence its

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track as required by an ordinance of the city of Chicago. Plaintiff, a child of tender years, went on this unfenced track and was injured. It was argued that the "want of a fence could not reasonably be alleged as the cause of the injury." In answer to this the court said:

"In the sense of an efficient cause, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, Was it causa sine qua non, a cause which if it had not existed, the injury would not have taken place? * * * The rule laid down by Willes, J., in *Daniel* v. *Railway Co.*, L. R. 3 C. P. 216, 222, and approved by the exchequer chamber, L. R. 3 C. P. 591, and by the house of lords, L. R. 5 H. L. 45, was this: 'It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to;' and in the case of *Williams* v. *Railway Co.*, L. R. 9 Exch. 157, where that rule was applied to a case similar to the present, it was said:

"'There are many supposable circumstances under which the accident may have happened, and which would connect the accident with the neglect. If the child was merely wandering about and he had met with a stile, he would probably have been turned back; and one at least of the objects for which a gate or stile is required is to warn people of what is before them and to make them pause before reaching a dangerous place like a railroad.'"

I now consider the contention of my Brother OSTRANDER, heretofore referred to, that the cow was drowned because she was attempting to drink from the opening in the ice left unprotected by defendants. This contention rests in part upon the assumption that this was the only place for her to drink. I regard this assumption as unfounded, for the plaintiff testified "somebody went down to see that the holes was open for the water, but I didn't." It thus appears that it was customary for someone to open these holes every morning, and there is no evidence that this custom was not observed on the morning in question. Moreover, another and sufficient explanation of the cow's

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drowning is furnished by the following testimony quoted from the record: A witness who visited the place with the plaintiff shortly after the cow was drowned, testified:

"The place where they had been cutting ice before, there had been some slush and snow and stuff thrown in the water and a scum of snow was formed."

Another witness testified:

"It was not all open water because we came pretty near walking into the hole ourselves. I didn't notice no cakes of ice; I didn't see anything to prevent a person or animal from walking into the ice; not a thing; would have done it if Mr. Richards hadn't hollered at us. * * * There was wet snow and ice around the edge of the hole; it was just like it was all over the lake."

From this testimony the inference may be drawn that the cow walked into the opening not because she was searching for a drink, but because there was nothing to distinguish it from the solid ice surrounding it. Neither can it be said as a matter of law that the statutory barricade placed ten feet away from the opening would not prevent a docile cow from attempting to get a drink from the open water beyond.

3. Contributory negligence. One of the grounds upon which it is contended that plaintiff's contributory negligence precludes recovery is that he committed an unlawful act in letting his cows go unattended in the public highway. The public cannot complain that this act was unlawful, for the board of supervisors, acting pursuant to legislative authority, had given plaintiff permission to do it. It is true it is held by a well-considered case (*Tonawanda R. Co.* v. *Munger*, 5 Denio [N. Y.], 255) that the public cannot confer upon an individual the right to use the highway "as a sheep walk or a pasture ground for cattle," for this would be "taking the private property of the owner of the land used as a highway and transferring it to the owner of the cattle." But I can see no reason to doubt that the public may permit cattle to pass unattended along the public highway, and if plaintiff's cows

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did nothing more than this—and it is not to be inferred that they did—they were not unlawfully in the highway, and plaintiff did no unlawful act in permitting them to be there for that purpose.

Third. I come now to the remaining ground, upon which it is urged that plaintiff was guilty of contributory negligence. That is this, that, knowing as he did that ice was being taken from the lake, he should have anticipated that his unattended cows would be exposed to the danger of falling through the opening from which the ice was taken. If plaintiff had known or had reason to anticipate that this opening was unguarded I should agree that he was guilty of contributory negligence. From the record we are able to say this, and only this, that he knew that ice was being cut. He himself had cut ice at this place and had, as he testifies, barricaded the opening. He had not himself visited the lake, and therefore had no personal knowledge of the method of defendants' operations. Shall we say that he was bound to know or to believe that they were leaving the opening without barricades? I am compelled to answer this question "no." He had a right to believe that defendants would observe the law. He was not bound to assume that they would violate it. His cows, in going unattended to the lake, were therefore exposed to a danger which, as a reasonably prudent person, he was not bound to anticipate. We cannot therefore say that he was guilty of negligence contributing to his loss.

Judgment should be reversed and a new trial ordered.

MONTGOMERY and MCALVAY, JJ., concurred with CARPENTER, J.

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BAKKER *v.* FELLOWS.

1. DRAINS—ESTABLISHMENT—APPLICATION — FREEHOLDERS — LIFE TENANTS.

   Under section 8787, 3 Comp. Laws, one who has an estate for life in lands is a freeholder within the meaning of section 4319, 2 Comp. Laws, providing that an application for a drain must be signed by not less than 10 freeholders.

2. LANDLORD AND TENANT — LEASE — VALIDITY — EXECUTION BY LESSEE—NECESSITY.

   A lease for life, properly signed and acknowledged by the lessor, containing covenants on the part of the lessee, is valid, though not signed by the lessee, he having taken and retained possession under it. OSTRANDER and MCALVAY, JJ., dissenting.

3. DRAINS—ESTABLISHMENT—APPLICATION—FREEHOLDERS—EQUITABLE OWNERS.

   Where a father, after promising to buy his son a farm in O. township, bought land there, taking title in himself, and afterward told the son that it was his (the son's) farm, and the son took and retained possession, cultivating the land, building buildings, and paying the taxes, the son had in equity a right to the premises in fee, and was therefore a freeholder, under section 4319, 2 Comp. Laws, providing that an application for a drain must be signed by not less than 10 freeholders. OSTRANDER and MCALVAY, JJ., dissenting.

4. SAME—OWNERS—EQUITABLE OWNERS.

   One who is an equitable owner of land by virtue of part performance of an oral promise to convey, consisting of possession and the making of improvements, is an owner, under section 4319, 2 Comp. Laws, providing that an application for a drain must be signed by five or more owners of lands liable to assessment for benefits. OSTRANDER and MCALVAY, JJ., dissenting.

Error to Ottawa; Padgham, J. Submitted January 23, 1908. (Docket No. 142.) Decided July 1, 1908.

Certiorari by Jacob Bakker and Fred Bakker against

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Edwin Fellows, drain commissioner, and Edward P. Kirby, probate judge, to review proceedings for the establishment of a drain. There was judgment for defendants, and plaintiffs bring error. Affirmed.

Walter I. Lillie and *Charles H. McBride*, for appellants.

Smedley & Corwin and *Corie C. Coburn*, for appellees.

HOOKER, J. This is a cause in which we are asked to review drain proceedings, and we take this opportunity to commend counsel for the exceptionally clear and concise manner in which both record and briefs present the meritorious questions involved.

An application was duly filed with the drain commissioner on February 15, 1907. It appeared to be signed by 10 persons, alleged to be freeholders of the proper township, and it alleged that 5 of these, naming them, were owners of land liable to be assessed for the proposed drain. On March 28, 1907, the commissioner filed his first order of determination, and being unable to obtain the right of way across the premises of the appellants (all others having released), he filed his petition for special commissioners. On June 5, 1907, the appellants filed their objections. They were in brief:

First, that the application was not signed by 10 freeholders.

Second, that it was not signed by 5 or more owners of lands liable to assessment for benefits.

Third, it alleged that one Ann V. Osborne, described in the petition as such freeholder and owner, was not such a freeholder, or a "freeholder at all."

A hearing upon the petitions was had and on July 6, 1907, the probate judge made the usual order appointing commissioners, expressly overruling the objection of appellants. On July 10, 1907, appellants filed with the probate judge a petition for rehearing based upon the further

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ground that another of said signers of the petition was not a freeholder, and that the fact was unknown to them at the time of the former determination. A hearing was had upon this application on July 15th, but the probate judge denied it on the grounds that he had no authority to grant such rehearing. On July 23, 1907, the special commissioners filed their report with the probate court, finding it necessary to take appellants' property, and awarding each $1 damage.

On July 24th a final order of determination was made and filed, and on July 31st a written notice of intention to review by certiorari was served on the commissioner by appellants. On August 7, 1907, the affidavit for certiorari was filed and the writ was issued by the circuit court. The drain commissioner made a return on August 19, 1907, simply denying the allegations of the affidavit, and asserting the regularity of all proceedings. On August 23, 1907, a petition was made for a further return, and the probate judge was made a party by order of the court. On the 27th of August, 1907, the probate judge made a return of the proceedings and evidence taken before him, and the commissioner filed a further return.

From these the following facts appear, viz.:

1. Ann V. Osborne's interest in land was confined to such as was conveyed to her by a writing attached to the return whereby several parties, named and described as parties of the first part, in consideration of rents and covenants specified, did let and lease to George Osborne and Ann V. Osborne, his wife, parties of the second part, premises described for the term of the natural life of both said second parties on terms and conditions specified. It expressly stated that the lease should terminate only on the death of both of said second parties.

"Provided, that in case any rent shall be due and unpaid, or if default be made in any of the covenants herein contained, then it shall be lawful for the said parties of the first part, their certain attorney, heirs, representatives and assigns, to re-enter into, repossess the premises, and

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the said parties of the second part, and each and every other occupant, to remove and put out.

"And the said parties of the second part do hereby hire the said premises for the term as above mentioned and do covenant and promise to pay to the said parties of the first part, their representatives and assigns, for rent of said premises for said term, the sum of one "Dollars" and other good and valuable consideration paid by said second parties to said first parties, the receipt whereof is hereby acknowledged, the same having been paid in advance before the ensealing and delivering of this lease. Said parties of the second part further covenant that they will not assign nor transfer this lease or sublet said premises or any part thereof without the written assent of said parties of the first part."

This document was signed only by the parties of the first part by whom it was also acknowledged. Nothing indicates that it was not delivered or that Mrs. Osborne was not in exclusive possession under it, as sole owner of the interest intended to be conveyed by it.

2. The commissioner supposed that Arend K. Brouwer was the owner of the premises occupied by him and a freeholder, and he never heard anything to the contrary until the petition for rehearing was filed. He then made inquiries and was informed that said Brouwer's father promised to buy him a farm in Olive township; that he bought this land taking title to himself. Subsequently he told his son that it was his farm, and the son entered into and afterward continued, and was in possession at the time of these proceedings, and in the interval he had occupied and worked the land for several years, built buildings, had it assessed to himself and paid the taxes in every respect as an owner, except that the father had never deeded the land to him.

Upon the hearing, the learned circuit judge was of the opinion that under the proofs Ann V. Osborne was a freeholder, and owner of lands liable to assessment and that—

"Under the showing made in this case as to the question of whether one Arend K. Brouwer was such a freeholder as claimed by plaintiffs, was not a proper subject

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or matter for the court's consideration upon the record as presented."

The order of the probate judge was affirmed. The cause is before us by writ of error.

The only questions discussed in appellants' brief are, whether the application for the drain was jurisdictionally defective: *First.* Because Ann V. Osborne was not a freeholder and a landowner. *Second.* Because Brouwer was not a freeholder.

Freeholders. Section 4319, 2 Comp. Laws, provides for an application signed by not less than 10 freeholders of the township, 5 or more of whom shall be owners of lands liable to assessment for benefits. Under our law one who has an estate for life in land is a freeholder. See 3 Comp. Laws, § 8787; *Crouse* v. *Michell*, 130 Mich. 356. It is contended that the instrument in question was a mere unilateral agreement; but we think that, when accepted and possession taken under it, it was a good and valid lease, although not signed by the lessees. Jones on Landlord and Tenant, §§ 75, 77–79. Inasmuch as this was a valid lease for life to Mr. and Mrs. Osborne, she had a freehold estate. The case of Brouwer is different. The claim that he is a freeholder within the statute is that he had, in equity, a right to the premises in fee. We are of the opinion that this is true, under the proof, upon the authority of *Maas* v. *Insurance Co.*, 148 Mich. 434, and *Starkweather* v. *Chatfield*, 149 Mich. 443.

Ownership. The remaining question relates to the title of Mrs. Osborne; counsel for the plaintiffs asserting that, although she may be called a freeholder, she was not an owner of premises liable to assessment for benefits. Inasmuch as we have reached the conclusion that Brouwer was the equitable owner in fee, it becomes unnecessary to consider Mrs. Osborne's ownership; there being 5 owners of land subject to assessment exclusive of her.

It is unnecessary to discuss the question of waiver, but our disposition of the meritorious question regarding

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Brouwer's title is not intended to imply that it was seasonably raised.

The judgment is affirmed.

GRANT, C. J., and MONTGOMERY, MOORE, and CARPENTER, JJ., concurred with HOOKER, J. BLAIR, J., concurred in the result.

OSTRANDER, J. (*dissenting*). I think it doubtful if Mrs. Ann V. Osborne is shown to be a freeholder. This for the reason that it is entirely uncertain whether she has ever assumed the obligations of a life tenant with respect to the land. Rent is reserved in the lease, and is then receipted for. There is no express obligation to pay taxes. The evidence is that she holds a certain instrument, sufficiently described in the opinion of Mr. Justice HOOKER, and is in possession of the land. Admitting that she is a freeholder, it seems to me to be clear that she is not an owner of the land. We may assume that the legislature might employ the word "owner" in such a connection, and for such a purpose, that it would mean something besides owner of the fee, or of the legal or equitable title. But it has not done so in the statute under consideration. On the contrary, the words "freeholders" and "owners" are both employed in the statute, and in such connection that in my opinion we are obliged to give them different meanings. The term "freehold estate" is legally definitive of both an estate for life and of an estate of inheritance. The estate of a vendee in a land contract, in possession, is an estate of inheritance. *Starkweather* v. *Chatfield*, 149 Mich. 443. So husband and wife owning land by entireties have each of them an estate for life. But one of them is not an owner, within the meaning of a statute requiring a petition for a public improvement to be signed by owners of property. *Auditor General* v. *Fisher*, 84 Mich. 128. An application for the laying out of a drain is jurisdictionally sufficient, not when it is signed by 10 freeholders, 5

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of whom shall have estates in land which is liable to assessment for benefits, but there must be 5 signers who are owners of such land. It is the boundary lines of each owner's land which the survey is required to show. The names of the owners of every tract to be traversed by the drain must appear in the application for the appointment of commissioners, and it is to owners that the citation is issued. It would seem that the owner of the fee, alone, could effectively release the right of way. The term "owners of land," as employed in 2 Comp. Laws, § 4319, means persons with whom the drain commissioner may make final and conclusive arrangements, persons whose land is liable to be affected by levies and by the exercise of the eminent domain. If it were otherwise, the proceeding might be instituted upon the application of persons, none of whom had any estate to be affected thereby. If it were otherwise, the 5 signers, claimed to be owners, might all of them be widows, occupying dower lands. The argument that a life tenant is an owner because impeachable for waste for failure to pay the taxes seems to me to be unsound. The statute does not refer to persons who are liable to an assessment, or who by contract, or by operation of law, are obligated to the landlord or to the remainderman to pay the taxes. It refers to land which is liable to an assessment for benefits and to the owners of such land. Moreover, I am not now prepared to determine whether, in the absence of a contract, a life tenant is under obligations to pay the extraordinary and sometimes very great expenses, arising from a public improvement like a drain, assessed as for alleged benefits to land. This court has sustained applications for drains by a liberal interpretation of the term freeholder, where that term is employed in the statute. To hold that the term owner, used in the statute in the same connection, signifies nothing different in meaning, is, in my opinion, to deny to public and to private interests a safeguard which the legislature intended should exist.

Objections to the appointment of commissioners were

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that the application was not signed by 10 freeholders, did not have signatures of 5 owners of land liable to assessment, and that Ann V. Osborne was not a freeholder. These objections were all overruled and an order made appointing commissioners. Thereupon plaintiffs in certiorari moved in the probate court for a stay of proceedings and rehearing, setting out that Arend K. Brouwer was not a freeholder. The petition was dismissed upon the ground of want of jurisdiction to grant a rehearing. In the affidavit for the writ of certiorari it is averred that the application was not signed by 10 freeholders nor by 5 owners of land liable to an assessment for benefits; that Ann V. Osborne is not an owner and that Arend K. Brouwer is not an owner nor a freeholder; that the application is signed by but 4 owners of land; that the probate court erred in its refusal to entertain the petition for a rehearing. The answer and return denied these allegations, generally. Petition was made for an order for a further return and one was ordered. In this return it is set out that no objection was raised before the probate court on the hearing for the appointment of commissioners in regard to Arend K. Brouwer, and that, therefore, any and all objections were waived. The circuit court was of opinion that the qualifications of Brouwer were not the subject of proper inquiry and did not determine whether he was freeholder or owner. His qualifications, so far as disclosed by the record, by the return of the drain comsioner, are:

"And this defendant further answering says that he always supposed Arend K. Brouwer to be the owner of land in said township of Olive and a freeholder; that his name so appeared in said application for said drain, and that he never heard anything to the contrary until after the judge of probate had made his order appointing the three special commissioners, and notices had been served on them, and they were entering upon their duties as such special commissioners, when these plaintiffs appeared before the probate court and asked for a rehearing, setting up for the first time that Arend K. Brouwer was not an

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owner of land in the township of Olive, and that this was the first knowledge that this defendant had in regard to the same. That he made inquiries thereafter and was informed that the father of Arend K. Brouwer promised to buy him a farm in the township of Olive, and that he did buy him a piece of land and told Arend K. Brouwer that it was his, and that Arend K. Brouwer entered into the possession of the same and built buildings on the same, has occupied and worked the same for several years, has had the same assessed to him on the tax rolls, has paid the taxes on the same and in every respect is the owner of the same except that this defendant has been informed that the record title still stands in the name of the father of said Arend K. Brouwer."

I am of opinion that the question was one to be determined by the court below. The application for the drain is signed by but 10 persons and it sets out the names of the 5 signers who are represented to be owners of land liable to an assessment for benefits. Among the names is that of Ann V. Osborne. Brouwer's name is not included. Ann V. Osborne is not an owner of land liable to assessment. Consequently, without some further showing, the probate court should have declined to appoint special commissioners. The facts in the application had been traversed and shown to be untrue. It is the drain commissioner then who, to save the application, asserts that there are, in fact, 5 signers who are owners. It is said that Brouwer is an owner. It was not so represented in the application and if he is not an owner then the drain commissioner has not shown that the application is sufficient in law. It seems to me that he is not in a position to urge that plaintiffs have waived the question of the qualifications of Brouwer. The inquiry is, and at all times has been, Is the application in fact signed by 5 owners of land liable to an assessment for benefits? The inquiry was seasonably made, and the decision is sought to be reviewed in the statute manner. The decision was wrong unless, as asserted by the commissioner, Mr. Brouwer is an owner. In my opinion, he is not an owner. He is not an appar-

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ent owner. Reliance is placed upon the decisions of this court in *Twiss* v. *George*, 33 Mich. 253; *Farmers' Mut. Fire Ins. Co.* v. *Fogelman*, 35 Mich. 481; *Dupreau* v. *Insurance Co.*, 76 Mich. 615; *Convis* v. *Insurance Co.*, 127 Mich. 616; *Maas* v. *Insurance Co.*, 148 Mich. 432. Certainly these decisions are being carried far afield when used to support the proposition advanced here. *Starkweather* v. *Chatfield*, 149 Mich. 443, is authority for no such contention. I see no occasion to refine upon the meaning of the term "owner of land," or to suppose the legislature intended in its use to designate other than the one in whom prima facie is the fee simple title. In any event, the statute owner must be a freeholder. Mr. Brouwer is not a freeholder. His interest in the land is represented and is evidenced by his possession and by a parol promise.

The judgment below should be reversed, and the proceedings quashed.

MCALVAY, J., concurred with OSTRANDER, J.

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SYNESZEWSKI *v.* SCHMIDT.

1. MASTER AND SERVANT — PERSONAL INJURIES — NEGLIGENCE — ACTION — VIOLATION OF STATUTORY DUTY — EMPLOYMENT OF CHILDREN.

Act No. 113, Pub. Acts 1901, as amended by Act No. 171, Pub. Acts 1905, prohibiting the employment of children under 14, and prohibiting the employment of children under 16 where dangerous to life or limb, though it does not expressly give a right of action to persons injured by its violation, and provides no remedy for one so injured, raises a duty to and for the benefit of persons of the class liable to be injured by its violation, and a child injured while so employed may maintain an action for his damages, if not himself a partaker in the wrong, or otherwise precluded by the principles of the common law from his proper standing in court.[1]

2. SAME — NEGLIGENCE — ASSUMED RISKS — CONTRIBUTORY NEGLIGENCE — DOCTRINES INCLUDED.

The law of actionable negligence, as applied between master and servant, embraces the doctrine of the assumption of risks on the part of the servant and the doctrine of contributory negligence.

3. NEGLIGENCE — WHAT CONSTITUTES — VIOLATION OF STATUTORY DUTY — PROXIMATE CAUSE OF INJURY.

Though disobedience of a statute may be conclusive evidence of negligence, a condition of recovery by one urging the disobedience is that such disobedience must be the proximate cause of the injury complained of, or that it contributed to the injury.

4. MASTER AND SERVANT — PERSONAL INJURIES — VIOLATION OF STATUTE — PROXIMATE CAUSE.

Where a boy under 16, employed in violation of Act No. 113, Pub. Acts 1901, was injured while so employed, the causal connection between the violation of the statute and the injury complained of was sufficient to support a recovery.

[1] On the question of employment of children in violation of statute as negligence, see note to *Rolin* v. *R. J. Reynolds Tobacco Co.* (N. C.), 7 L. R. A. (N. S.) 335

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5. SAME—FELLOW-SERVANTS—APPLICATION OF DOCTRINE.
The risk of injury by the negligence of fellow-servants cannot be assumed by a child under 14 employed in violation of the statute. Act No. 113, Pub. Acts 1901, as amended.

6. SAME—EMPLOYMENT OF CHILDREN—KNOWLEDGE OF EMPLOYER.
Where defendant employed plaintiff, under 16, without obtaining the sworn statement of parent or guardian required by the statute, Act No. 113, Pub. Acts 1901, as amended, he was not relieved from liability for injury to plaintiff during the employment by the fact that plaintiff told him he was over 16 and he accepted the statement in good faith.

Error to Wayne; Brooke, J. Submitted February 20, 1908. (Docket No. 120.) Decided July 1, 1908.

Case by Czeslau Syneszewski, by next friend, against Carl E. Schmidt and Joseph Metzger, copartners as Carl E. Schmidt & Company, for personal injuries. There was judgment for plaintiff, and defendants bring error. Affirmed.

Keena, Lightner & Oxtoby, for appellants.

William Van Dyke, for appellee.

Act No. 113, Public Acts 1901, prohibits employment of any child under the age of 14 years in any manufacturing establishment. Violation of the act is a misdemeanor. The statute further provides that no child under the age of 16 years shall be employed at employment whereby its life or limb is endangered. The statute gives no right of action to persons injured by its violation. The statute does not provide a remedy for one injured by or on account of its violation. As amended by Act No. 171, Public Acts 1905, the statute not only prohibits employment of children under 14—contracting for their services, —but, also, that they shall not be permitted or suffered to work.

Testimony produced on the part of plaintiff tended to prove that he attained the age of 13 years July 10, 1905, and was employed by defendants in September or Octo-

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ber of that year to work in their tannery; that he was not asked, and made no representation concerning, his age. His duties were to take skins from the table of a machine and lay them on a wooden horse, to wash the machine three times a week with water, and to do other work. He was injured January 16, 1906, while assisting in cleaning the machine, a work at which he was set by the person in charge of the machine, who, he was told, was his "boss." The "boss" worked at cleaning on one side of the machine, plaintiff on the other, the machine being idle. The "boss," without warning, started it for the purpose of reaching uncleaned portions of the machinery, and plaintiff's fingers were caught in cogs. As the case was left to the jury, they were permitted to return a verdict for plaintiff if they found plaintiff to have been under 16 years of age, to have been employed at work dangerous to life or limb, and to have himself been free from negligence contributing to the injury. Errors assigned by defendants, appellants, raise, and they present in this court, two questions of law. It is contended, *first*, that defendants are not liable because the injury was caused by a fellow-servant of the plaintiff; *second*, that the court erred in refusing to instruct the jury as, in effect, requested to do, that if plaintiff represented himself at the time he was hired to be more than 16 years of age, and if defendants in good faith believed him to be more than 16, they were not liable, and in saying to the jury in this connection:

"I do not so charge you because I do not believe that is the law. That he did so represent himself and if they did in good faith believe his representations, that would relieve them of any moral responsibility touching their actions, but according to my view of the law it does not relieve them from legal liability if in fact the child was, at the time he was hired, of the age now claimed by his parents, to wit, under fourteen years of age."

It is contended, also, that the act of the "boss," and not the violation of the statute, was the proximate cause of injury.

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OSTRANDER, J. (*after stating the facts*). It is not open to question (*Sipes* v. *Starch Co.*, 137 Mich. 258, *Sterling* v. *Carbide Co.*, 142 Mich. 284, *Beghold* v. *Auto Body Co.*, 149 Mich. 14) that this statute raises a duty to and for the benefit of persons of the classes liable to be injured by its violation. It is the general rule that a civil action is maintainable where the person complaining is of a class entitled to take advantage of the law, is a sufferer from the disobedience, is not himself a partaker in the wrong of which he complains, or is not otherwise precluded by the principles of the common law from his proper standing in court. Bishop on Non-Contract Law, §§ 132-141. The legal principles employed in enforcing a remedy are found in that body of rules known as the law of negligence, modified as the judicial conception of the legislative conception and as necessity seems to require. 1 Thompson on Negligence, § 23. The law of negligence, which means, of course, the law of actionable negligence, as applied in most jurisdictions, embraces the doctrine of the assumption of risks on the part of an employé and the doctrine of contributory negligence. It embraces, also, the doctrine, announced at an early day by this court (*Billings* v. *Breinig*, 45 Mich. 65, 71), that, although disobedience of a statute may be conclusive evidence of negligence, a condition of recovery by one urging the disobedience is that such disobedience must be the proximate cause of the injury complained of or that it contributed to the injury. For the purpose of enforcing civil remedies based upon violations of similar statutes, some courts have denied the application of the doctrine of contributory negligence. *American Car & Foundry Co.* v. *Armentraut*, 214 Ill. 509; *Lenahan* v. *Mining Co.*, 218 Pa. 311 (12 L. R. A. [N. S.] 461). In Minnesota, the questions of the assumption of risk and of contributory negligence are for the jury, the burden of proving them being with the defendant after plaintiff has shown a violation of the statute and injury resulting from the employment. *Perry* v. *Tozer*, 90 Minn. 431. So in Iowa: *Bromberg*

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v. *Laundry Co.*, 134 Iowa, 38; in New York: *Marino* v. *Lehmaier*, 173 N. Y. 530 (61 L. R. A. 811); and in North Carolina: *Leathers* v. *Tobacco Co.*, 144 N. C. 330. In the Illinois case the rule announced is the one usually applied in suits by the public to recover the statute penalty, *McCutcheon* v. *People*, 69 Ill. 601; *People* v. *Snowberger*, 113 Mich. 86; *People* v. *Grocer Co.*, 118 Mich. 604, and in cases like *Flint, etc., R. Co.* v. *Lull*, 28 Mich. 510, 515. See, also, *Malloy* v. *Leather Co.*, 148 Fed. 482. In giving effect to a portion of the statute we are now considering, this court held that the plaintiff did not assume the risk of violation of the statute duty. *Sipes* v. *Starch Co.*, supra. In *Sterling* v. *Carbide Co.*, the plaintiff was injured by machinery while doing the work he was employed to do. It was held that—

"Disregard of the inhibition of this statute, by placing the plaintiff at work at an employment where his life or limb was endangered, constituted the negligence or wrong of which plaintiff has the right to complain, and that the causal connection between that wrong and the injury to plaintiff is clear."

It was said further that the question of assumption of risk was settled by the case of *Sipes* v. *Starch Co.* Upon this point I am not able to distinguish the case at bar and the *Sterling Case.* A distinction sought to be made by counsel rests upon the fact, in the case at bar, that plaintiff was injured by the negligent act of a fellow-servant; that the work he was doing was not in itself dangerous and that injury would not have resulted but for such negligent act. In the argument counsel fail to give effect to two important facts. In the first place, it was not lawful for defendants to employ plaintiff in their establishment at any work. It is true the trial court did not instruct and the jury did not proceed upon this particular inhibition. But the fact is not disputed, and when the law forbids that one shall be employed as a servant it seems illogical to say that he may be a fellow-servant, or that the employer can be permitted to say that one who under the

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terms of positive law may not be his servant is fellow-servant of his servants. It is only by becoming a servant that the risks of employment, including those arising out of the negligence of fellow-servants, is assumed. In the second place, there was in this case what may be termed a double violation of the statute. Plaintiff was injured, as was the plaintiff in the *Sterling Case*, while engaged in the work he was set to do. It was dangerous work if his "boss," without warning, set the machine in motion. He did set it in motion and injury resulted. The negligence of the "boss," who was undoubtedly a servant of the employer, was a hazard of the employment which, if assumed by plaintiff, effectually destroys his right to the enforcement of the statute duty. It was not different, so far as assuming risk is concerned, from the hazard arising from unguarded machinery. And any argument based upon the idea that the injury was caused by a fellow-servant implies that the rule obtaining in cases where injury is caused by an intervening, independent, responsible human agency has no application. See *Nickey* v. *Steuder*, 164 Ind. 189. Compare *Rolin* v. *Tobacco Co.*, 141 N. C. 300 (7 L. R. A. [N. S.] 335). Appellants' first and last contentions are therefore overruled.

Defendant Metzger testified that after the employment of plaintiff and previous to his injury he talked with him:

"*Q.* Did you ask this boy his age?
"*A.* I did, and he said he was 16.
"*Q.* Did he look it?
"*A.* Yes, he did."

He further testified that plaintiff at the hospital, after being injured, stated that he (plaintiff) told the foreman of defendants when he hired him that he was 16 his last birthday. Another witness testified that after the injury the mother of plaintiff stated that plaintiff told her he had a job and that he told the boss he was 16. All of this testimony was contradicted. The question is whether, assuming the testimony on the part of defendants to be true, it furnishes a defense to the action. It may be sup-

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posed that in time the statute will be perfected so as to extend the prohibitions to children and to their parents; that the legislature will more definitely point out the evidence upon which employers may rely in employing minors at labor. It does now provide that no child under the age of 16 shall be hired or employed in any manufacturing establishment, hotel, or store—

"Without there is first provided and placed on file a sworn statement made by the parent or guardian, stating the age, date and place of birth of said child, and that the child can read and write. * * * If said child have no parent or guardian, then such statement shall be made by the child, which statement shall be kept on file by the employer, * * * and which said * * * statement shall be produced for inspection on demand by any factory inspector appointed under this act: *Provided*, That in the city of Detroit and the city of Grand Rapids all sworn statements must be made before a deputy factory inspector."

Some effect must be given to this provision. It is unnecessary to determine whether it is mandatory or whether a false statement made by a parent would prevent a recovery by a child unlawfully employed. It is a precaution which in furtherance of the legislative purpose the employer is in terms required to observe. It cannot be said that its observance would not tend to prevent unlawful employment of children, and, therefore, prevent violations of the law. It is calculated not alone to discover the exact age of children under 16, but, also, whether they are over or under that age. Defendants did not observe it. They say it is not required if the child is more than 16 years old. But plaintiff was not 16 years of age and was employed by them, in violation of the statute, without any precaution except to inquire his age and to judge, from his appearance, that he was telling the truth. His age was in question, they regarded the fact as of importance and they determined, upon the evidence presented, whether his employment would be lawful or unlawful. It has been suggested that the statute should be

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construed as providing, in effect, for a certificate and permit from the parents or guardians of children,—a construction which is aided by the words employed in the 1905 form of the statute,—in the absence of which, so far as the age of the child is concerned, employers hire children at their peril. Whatever force there may be to this suggestion, it is sufficient for the purposes of this case to say that all that defendants did they would be, in good faith, required to do in any case. But the statute does not accept the mere statement of a child as to his age and the court cannot aid one who did accept it.

The judgment is affirmed.

GRANT, C. J., and BLAIR, MONTGOMERY, and MOORE, JJ., concurred.

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WOLFE v. STACK.

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY—DIRECTION OF VERDICT.
   An assignment that the court erred in directing a verdict for defendant implies that upon the pleadings and evidence a prima facie case was made, and is sufficiently specific.

2. SALES — CONTRACTS — CONSTRUCTION — PARTNERSHIP — SURVIVING PARTNER—LIABILITY.
   In an action against a surviving partner for goods and supplies sold and delivered to a lumber company alleged to have been operated by the firm, evidence examined, and *held*, that whether the firm in fact owned and operated the company's business, so as to render the surviving partner liable, was for the jury.

Error to Delta; Stone, J. Submitted April 8, 1908. (Docket No. 2.) Decided July 1, 1908.

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Assumpsit by Augustus W. Wolfe against John K. Stack, surviving partner of himself and John Corcoran, deceased, copartners as Stack & Corcoran, and the Escanaba Lumber Company, for goods sold and delivered. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

Yelland & Norblad (*Gallup & Gallup*, of counsel), for appellant.

F. D. Mead, for appellee.

MOORE, J. Suit was brought by the plaintiff, for himself and as assignee of the firms named in the title of the cause, against John K. Stack, as surviving partner of himself and John Corcoran, deceased, copartners, doing business under the firm name of "Stack & Corcoran." The declaration is on the common counts in assumpsit and alleges further that they were partners under the firm name of the "Escanaba Lumber Company." The suit was brought, as stated in the bill of particulars, to recover for goods sold and delivered to the Escanaba Lumber Company. It was stipulated that plaintiff's claim, as set out in plaintiff's bill of particulars, was a true statement of the debit side of the account of the plaintiff and his assignors with the Escanaba Lumber Company, according to the books of that company. It was further stipulated, however, that this stipulation should in no way admit the liability of the defendant to pay the accounts or any part thereof.

It was also the claim of plaintiff that defendants took control and managed the business under such circumstances as to make them liable for the supplies furnished by plaintiff and his assignors which it was claimed were used in the business. After plaintiff had concluded his testimony, and without defendant offering any testimony, the trial judge directed a verdict in favor of defendants. The case is brought here by writ of error.

We are confronted at the outset with the question of

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whether the assignment of error is a good one. The appellee claims it is too general to be considered. The assignment is: "The court erred in directing a verdict in favor of the said defendant of no cause of action." Counsel cite *Johnson* v. *Ballou*, 25 Mich. 460, and *Jackson Bridge & Iron Co.* v. *Insurance Co.*, 122 Mich. 433. In the first of these cases the court considered the case and reversed it. We will refer to the last named case later. The case of *Conely* v. *Dudley*, 111 Mich. 122, is on all fours with the case at bar. In that case the court said:

"It is contended that the assignment of error, i. e., 'that the court erred in directing a verdict for the defendants,' is not special under Sup. Ct. Rule No. 12. Upon this record this assignment was equivalent to saying that there were facts in the case upon which a jury might find plaintiffs entitled to recover,—a radically different case from one where the court is said to have committed error in directing a verdict for the plaintiffs, or in refusing to direct one for the defendants."

In the case of *Jackson Bridge & Iron Co.* v. *Insurance Co.*, supra, the court referred to the case of *Conely* v. *Dudley*, supra, in the following language:

"The case of *Conely* v. *Dudley*, 111 Mich. 122, may seem exceptional, as the case was reversed upon the assignment that 'the court erred in directing a verdict for the defendant.' The case appears to be in a nutshell, no testimony being offered by the defense, and there was no possible uncertainty as to what was meant. In *Michigan Mut. Life Ins. Co.* v. *Mather*, 113 Mich. 357, the assignment was that the court erred in refusing to direct a verdict for the defendant. The question does not appear to have been raised, and the case was affirmed on other points. The decisions are uniform upon the question, unless the case of *Conely* v. *Dudley*, supra, should be thought to be inconsistent. It was looked upon as exceptional, and was not intended to change the rule, but, rather, as not being within the rule, because not within its reason; the only possible question being whether there was evidence requiring the submission of the case to the jury."

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In the case before us no one has been misled. The case has been thoroughly briefed on both sides. The court and counsel both understood that the question was whether upon the testimony offered by the plaintiff the case should be submitted to the jury. Upon the record made we think the assignment sufficient.

This brings us to the important question in the case: Did the plaintiff make a case which in the absence of any testimony on the part of defendants entitled him to have his case submitted to the jury? His testimony consisted of four written contracts, portions of an answer in a chancery case which was sworn to by Mr. Corcoran, the oral testimony of a number of witnesses, book entries and checks. In the second of these contracts was the following:

"It is hereby agreed by and between the parties hereto that said parties of the first part shall dispose of lands or cut and manufacture all the timber upon said lands, to sell all chattels, materials, etc., and apply the actual amount of the money received as follows: To apply as payment on the within mentioned indebtedness or any other money said first parties may pay out for any purpose, etc. * * *

"It is further hereby agreed and understood, by and between the parties hereto, that said parties of the second part shall be entitled to a reconveyance of all the real estate and chattels or personal property which has not sooner been disposed of by said first parties, upon the payment of the amount due to said first parties by said second parties, paying all the expenses of transfer, stamps, recording, etc., any material, goods, machinery, etc., purchased to become the property of said first parties as soon as received by either parties, this to include all debts of said parties, including September 19th, 1899, and after which went to the business of said second parties, also contract between the parties hereto, dated September 19th, 1899, to continue in force.

"Dated this 18th day of February, 1901.

"Signed,

"STACK & CORCORAN,
"ISAAC LANFORD,
"JOHN S. ARMSTRONG,
"RAE F. ARMSTRONG."

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Upon March 4, 1901, a contract was prepared by John Corcoran reading as follows:

"Articles of agreement, made and entered into this 4th day of March, in the year of our Lord nineteen hundred and one, by and between Isaac L. Lanford, John S. Armstrong and Rae F. Armstrong, copartners under the firm name of Masonville Hoop Company, of the township of Masonville, Delta county, Michigan, parties of the first part, and Joseph E. Reinger, party of the second part.

"It is hereby known and understood by the parties hereto that the above named concern, Masonville Hoop Company, is owned and controlled by Stack & Corcoran of the city of Escanaba, Michigan, but, whereas, Isaac L. Lanford has put in said concern, cash to the amount of one thousand dollars, property one thousand dollars; John S. Armstrong cash five hundred dollars; Rae F. Armstrong, cash five hundred dollars, and on the payment of one thousand dollars by Jos. E. Reinger to Stack & Corcoran, to be placed on the credit of said Masonville Hoop Company, said first party assigns, sells and sets over to said second party, a one-third interest of all of our interest in said Masonville Hoop Company, which we have a contract with said Stack & Corcoran the right to redeem, release said property by paying to said Stack & Corcoran all the indebtedness due them, and on the paying up and redeeming of said property, the parties hereto would be entitled to their interests as follows:

"Isaac L. Lanford, one-third; John S. Armstrong, one-sixth; Rae F. Armstrong, one-sixth; Joseph E. Reinger, one-third; and Isaac L. Lanford would be entitled to an additional one thousand dollars from the parties hereto for property put in.

"It is also agreed by the parties hereto that office of said concern be kept at Escanaba, Michigan, and that Joseph E. Reinger be general manager under the directions of said Stack & Corcoran and that all business will be transacted through the Escanaba office.

"The said Joseph E. Reinger agrees to give all his time and attention to said business and any outside business he may do in the way of buying and selling lumber, shingles, poles, etc., to be done in said concern's name, and said business derives any profit there may be in it, which is also to be done under the supervision of said Stack & Corcoran.

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"It is also understood and agreed by and between the parties hereto, that any lands, material, machinery and all other property purchased by the parties hereto, or the said Stack & Corcoran to become the property of said Stack & Corcoran as soon as purchased, all material and property sold by said parties hereto to be done in the name of said Stack & Corcoran and under their directions and all money payable to them.

"The parties hereto are not entitled to salaries, not to exceed as follows, from this date; Isaac L. Lanford, sixty dollars; John S. Armstrong and Rae F. Armstrong, sixty dollars for John S. Armstrong's services; Jos. E. Reinger, sixty dollars per month, the salaries are for actual services performed by the said Isaac L. Lanford, John S. Armstrong and Jos. E. Reinger, Rae F. Armstrong not to be entitled to any salary. The parties of the first part are not to have any back salaries previous to this date.

"Signed,
"ISAAC L. LANFORD,
"JOHN S. ARMSTRONG,
"RAE F. ARMSTRONG,
"JOS. E. REINGER."

After the making of this contract there is evidence tending to show that Lanford, Armstrong and Reinger commenced to work upon a salary, and the business of cutting and manufacturing timber upon the lands formerly owned by the Masonville Hoop Company was conducted in the name of the Escanaba Lumber Company; Joseph E. Reinger acting as the manager but under the control and management of Stack & Corcoran. Later the following agreement was made:

"It is agreed and understood by and between the Escanaba Lumber Company and Stack & Corcoran, that any money received by said Escanaba Lumber Company, in connection with their business, is to be turned over to Stack & Corcoran as soon as received, for which said Stack & Corcoran agree to place to the credit of said Escanaba Lumber Company; also all checks, drafts, notes or paper of any other description received by said Escanaba Lumber Company, in connection with their business to be turned over to said Stack & Corcoran

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as soon as received, for which said Stack & Corcoran agree to place to the credit of said Escanaba Lumber Company.

"It is understood by and between the parties hereto that said Stack & Corcoran are the only ones that have the right to purchase the lands, materials, etc., also to indorse and negotiate drafts, checks, notes or papers of any other description, received by said Escanaba Lumber Company.

"This agreement not to interfere with any previous agreement entered into.

"Dated this 12th day of March, 1901.

"Signed,

"ESCANABA LUMBER COMPANY,

"Per JOS. E. REINGER, Mgr."

Later Mr. Corcoran swore to an injunction bill in which Stack & Corcoran are the complainants; in which bill the various contracts are referred to. The following paragraphs occur in said bill:

"And your orators further show unto the court that thereafter, to wit: within a few days after the execution of said last agreement, the name of the Masonville Hoop Company was changed to that of the Escanaba Lumber Company and the business of said company was thereafter conducted under the name and title of the Escanaba Lumber Company, your orators under the terms of said contracts having title to and possession of all the property, including mills, lands and offices of said Masonville Hoop Company and said Escanaba Lumber Company.

"The said Joseph E. Reinger was employed by your orators to superintend and care for the work of the said Escanaba Lumber Company, in the forests, mills and offices of the company under the direction, control, government and orders of your orators and the said Joseph E. Reinger was called and known as the manager of the Escanaba Lumber Company, and as such had under the direction of your orators, aforesaid, control and management of the operations of said company in the forests and mills. * * *

"And your orators further show unto the court that, since the 12th day of March, 1901, and down to the present time, the said Joseph E. Reinger has been permitted by your orators to manage said business, to superintend

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said mills and the operations in the forests, connected with the affairs of the said Escanaba Lumber Company and to have charge of the office and the books thereof, but all under the control, management and direction of your orators. * * *

"And your orators further show unto the court that, on account of said Joseph E. Reinger removing and causing to be removed the books mentioned in paragraph thirteen, and on account of said Joseph E. Reinger violating the contracts entered into by and between himself and your orators and his contract of employment, your orators on the 25th day of November, A. D. 1902, discharged the said Joseph E. Reinger from their employment, and that since said time, your orators have been in full custody and control of all of the business of said Escanaba Lumber Company, and that the said Joseph E. Reinger, since said discharge, has in no way had any custody or control of any of the business of said Escanaba Lumber Company, and that your orators are now in full possession and control of said business."

The evidence tends to show that insurance was placed upon the property of the Escanaba Lumber Company in the name of Stack & Corcoran as owners. Also that about November 26, 1902, John Corcoran served a notice upon the postmaster at Escanaba, claiming that the Escanaba Lumber Company was owned by himself and Mr. Stack, and that they were entitled to receive the mail.

Certain oral admissions of Mr. Corcoran were shown. In November, 1902, Mr. Corcoran made a complaint before a justice of the peace, charging Joseph E. Reinger with larceny of the books of the Escanaba Lumber Company. A large number of checks of the Escanaba Lumber Company signed by Stack & Corcoran given at various times from July 3, 1902, to December 2, 1902, were in evidence.

We have recited enough of the testimony to show that the plaintiff was entitled to have his case submitted to the jury.

Judgment is reversed, and new trial ordered.

BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

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HOOKER, J. (*concurring*). Error is assigned upon the direction of a verdict for defendant. This implies that, upon the evidence and pleading introduced, a prima facie case was made, for the direction of the verdict implies the contrary. It is true that the ground upon which the verdict is directed may be a lack of evidence, or an insufficient declaration, and it would certainly be a convenience to know which. But if no indication is given by the trial judge, a defeated party cannot well be more specific in his assignment.

Therein an assignment of error on a direction of verdict for defendant is distinguishable from a direction for a plaintiff, or a refusal to direct, for plaintiff or defendant, for in either of the latter cases the appellant can and must point out a specific defect, which necessarily or at least presumptively enters into the decision.

We have pointed out this distinction in two cases, viz., *Conely* v. *Dudley*, 111 Mich. 122; *Jackson Bridge & Iron Co.* v. *Insurance Co.*, 122 Mich. 433.

When the record affords the appellant the means of making an assignment more specific, we think it should be done, but when there is no means of doing so, as in the cases cited and in the present case, the assignment should be sufficient.

I concur with Mr. Justice MOORE in reversing the judgment.

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SCHNEIDER *v.* TOWNSHIP OF BROWN.

1. HIGHWAYS AND STREETS — EMBANKMENTS — MAINTENANCE — INJURIES TO LANDOWNER — INCOMPETENT EVIDENCE — ADMISSION — CURE OF ERROR.
   In an action by a landowner for injuries to his mill pond by the construction of an embankment therein to carry a highway across it, evidence was admitted showing the location of the culvert to be outside the original channel of the stream, and also showing the location of the mudsills, which the judge concluded was incompetent, no such claim being made in the declaration, and he instructed the jury not to consider it. *Held*, that no prejudice appeared.

2. SAME — INJURIES TO MILL POND — EVIDENCE — ADMISSIBILITY.
   Evidence of labor performed in removing logs, of the effect of water preserving the logs when sunk, of the construction of fences by plaintiff alongside the bridge and his reason therefor, of the soundness of some of the logs taken out of the pond and sawed into lumber, of the value of the logs in the pond, of the ordinarily necessary repairs to the mill, how the embankments were constructed, and other evidence of a similar nature, *held*, competent as bearing upon the various issues involved.

3. APPEAL AND ERROR — SECOND APPEAL — LAW OF THE CASE.
   The opinion of the case on a previous appeal is the law of the case, no difference in the records being pointed out.

Error to Manistee; Rose, J. Submitted April 17, 1908. (Docket No. 14.) Decided July 1, 1908.

Case by Casper Schneider against the township of Brown for damages to a mill pond caused by the maintenance of an embankment in a highway. There was judgment for plaintiff, and defendant brings error. Affirmed.

Pratt & Davis, for appellant.

Fowler & Belcher, for appellee.

GRANT, C. J. This case is before us for the second time. (142 Mich. 45.) A full and complete statement of

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the case is there made, the issues involved are stated and the law governing the case established. It has been retried upon the law of the former opinion, and a verdict rendered again for the plaintiff. The appellant presents 73 assignments of error, all of which appear to be insisted upon. Thirty-four of these assignments relate to the rulings of the court upon the testimony.

Evidence was admitted showing the location of the culvert to be outside of the original channel of the stream, and also showing the location of the mudsills. Before the case was closed the trial judge concluded that this testimony was incompetent, as no such claim was set up in the declaration, and pointedly instructed the jury that they should not consider that testimony; that it was out of the case. We see no reason for holding that the jury were prejudiced or misled by the admission of the evidence.

Evidence of labor performed in removing the logs, of the effect of water preserving the logs when sunk, of the construction of fences by the plaintiff alongside the bridge and his reason therefor, of the soundness of some of the logs taken out of the pond and sawed into lumber, of the value of the logs in the pond, of the ordinarily necessary repairs to the mill, how the embankments were constructed, and other evidence of a similar nature, were competent as bearing upon the various issues involved. It would be of no benefit to the parties or to the profession to discuss all of these assignments.

Counsel for appellant do not point out wherein the present record differs from that in the former. The instruction of the court is very lengthy and undoubtedly necessarily so. It covered all the many phases of the case, and is in strict accord with our former opinion. We deem it unnecessary to discuss the case further.

We find no error in the record, and the judgment is affirmed.

BLAIR, MONTGOMERY, HOOKER, and CARPENTER, JJ., concurred.

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G. F. SANBORN CO. *v.* ALSTON.

1. TAXATION—TAX SALES—NOTICE TO REDEEM—SUFFICIENCY.

   A notice of the sale of land for taxes, served on the record owner pursuant to section 140 of the tax law (Act No. 229, Pub. Acts 1897), is not relieved of its invalidity for failing to state the county and State in which the lands are situated, and whether the township and range mentioned are north or south, east or west, by the facts that no town and range of the same numbers exists in any other State or Territory, and only one such in the State of Michigan, since the record owner is not required to search the records of the surveyor general's office in Washington, or the records of other States, to determine whether there is any other like description.

2. SAME—LACHES OF LANDOWNER.

   The fact that a landowner has for 15 years given his lands no attention and permitted the State to collect its taxes as best it might is not such laches as will estop him from insisting upon a substantial compliance by a tax purchaser with the provisions of section 140 of the tax law with respect to the notice of purchase.

3. SAME—NOTICE TO REDEEM—WHEN REQUIRED—APPLICATION OF STATUTE.

   Act No. 229, Pub. Acts 1897, as amended, requiring tax purchasers to give the record owners the notice therein prescribed, and allowing the owners six months after notice to obtain a reconveyance upon compliance with the specified conditions, applies as well to lands which before the passage of the act had been bid in to the State, and to which the State, as the law then stood, had an indefeasible title, as to lands subsequently bid in.

ON MOTION FOR REHEARING.

1. TAXATION—TAX SALES—REDEMPTION—SUBSEQUENT TAXES.

   Where, by reason of a technical defect in the notice to redeem, the record owner is still entitled to a reconveyance from the tax purchaser, notwithstanding the expiration of the statutory period, equity will not lend him its aid to enforce his right unless he reimburses the tax purchaser for the amount paid by him for taxes assessed upon the land subsequent to his tax purchase.

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2. EQUITY—MAXIMS.
He who seeks equity should do equity.

3. MORTGAGES—TAXATION—RIGHTS OF MORTGAGEE—PAYMENT OF TAXES.
A mortgagee is entitled to pay taxes and to have an additional lien upon the land therefor, though the mortgage is silent as to the payment of taxes.

4. TAXES—PAYMENT—RIGHTS ACQUIRED.
Where one pays taxes in good faith, claiming title but having none, he is entitled to reimbursement out of the land.

Appeal from Houghton; Streeter, J. Submitted April 13, 1908. (Docket No. 60.) Decided July 1, 1908. Motion for rehearing submitted September 8, 1908. (Calendar No. 22,687.) Former opinion modified September 15, 1908.

Bill by the G. F. Sanborn Company against David M. Alston, the Worcester Lumber Company, and others, to quiet title to land, and to enjoin the removal of certain timber. Defendants Alston and the Worcester Lumber Company, Limited, filed an answer in the nature of a cross-bill to quiet title. From a decree for complainant, and dismissing the cross-bill, defendants appeal. Affirmed.

Ball & Stone, for complainant.

Chadbourne & Rees, for defendants.

David M. Alston (*Thomas Patterson* and *Frank W. Stonecipher*, of counsel), in pro. per.

Complainant owns the patent title to the lands involved in this suit, which are situated in the counties of Houghton and Baraga. Defendants own tax titles which were purchased from the State through the auditor general in 1900 and 1901. Tax deeds were issued to defendant Alston, the purchaser. The tax title owners on January 19, 1903, sold certain of the timber upon these lands to the defendant Worcester Lumber Company for $36,000,

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$27,000 of which was paid at the time of making the contract. That company was making preparations to lumber when this bill was filed to enjoin the cutting of the timber, alleging that the defendants had not complied with Act No. 229, Pub. Acts 1897, in serving proper notice upon the original owners of the amount of taxes due thereon, and thereby affording them an opportunity to obtain a reconveyance. Notices were prepared and served upon the then original owners, and in most cases were served by the sheriffs; in the other case service was made by registered letter and publication.

The total amount of taxes in Houghton county set out in the notice as having been paid by Mr. Alston, in purchase of the tax title, was $648.03, and in Baraga county, $108.50, making a total of $756.53. The objection to the validity of the notices as to the lands is:

(1) That the notices do not state in what State, Territory, or country the lands are situated.

(2) It is claimed that, on certain of the lands in Houghton county, the notices contained an amount in excess of the requirements of the law, and that the total excess amounted to $37.25. It is alleged that in Baraga county the excess was $16.92. Complainant's grantor, through its solicitors, Ball & Stone, deposited with the register in chancery, in order that it might acquire a reconveyance of the lands from the defendants, double the amount paid by Mr. Alston, less the above amount claimed to be in excess of the requirements of the law. Defendant Alston and all claiming an interest in the lands were served with a notice that the money was so deposited for them.

(3) Objection is made to the validity of two of the notices because different parcels of land separately assessed and separately sold were grouped together, and one amount stated as the purchase price of the entire group.

(4) Objection is made that the sheriff's return of service is not evidence of the facts therein set forth, and, there being no other evidence of service, defendants must fail for want of proof of service.

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The court held the notices void, under *Tucker* v. *Van Winkle*, 142 Mich. 210, because they failed to state the State, county, or country in which the land was located.

The defendants contend:

(1) That the complainant and its grantors are guilty of such laches as to prohibit relief in a court of equity.

(2) That as to the lands in Houghton county, they were purchased directly from the State when the State held the indefeasible title thereto, and that that title passed to the defendant Alston free from the provisions of Act No. 229, Pub. Acts 1897, and amendments thereof.

(3) That the proofs show that there are no other townships and ranges in any State or Territory numbered to correspond with those in this case.

(4) That the amounts specified in the notices are not in excess of those required by the law.

(5) That the return of the sheriff is competent evidence of the service of the notice.

GRANT, C. J. (*after stating the facts*). 1. The description in the notices in this case is the same as those in *Tucker* v. *Van Winkle*, 142 Mich. 210, except that in that case the town was described as north and the range as west, while in this case the notices failed to state whether the township was north or south, or the range east or west, and are therefore more indefinite than the description in that case. This itself, however, would be immaterial to one versed in the governmental surveys, for there is no other township or range in the State than those described in the notice. This case is ruled by *Tucker* v. *Van Winkle*, unless we are enabled to say that there are no other like descriptions of land in any of the States or Territories, and that the original owners are chargeable with knowledge of that fact. Parties are presumed to know the law, and ignorance of it is no excuse. This rule, however, does not apply to the existence or nonexistence of things which may appear upon some public records or may be shown by extrinsic evidence. This question is not to be determined as if this were a contract or deed between two parties where the intention

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is of importance and often determinative of the result. Undoubtedly, if the case of *Tucker* v. *Van Winkle* had been between parties where one had given a deed to the other, it would have been entirely competent to show by extrinsic evidence what land was intended. In tax cases the owner has no intent to be considered. He is proceeded against ex parte. There is no intention on his part upon which extrinsic evidence may throw light or to which operation can be given. *Jones* v. *Pelham*, 84 Ala. 208; *Jackson* v. *Sloman*, 117 Mich. 126. The average layman is unversed in surveys and could have no knowledge that there was no like description in any other State or Territory. The notice which the original owners in this case received did not specify the State or county where the lands were located. As we held in *Tucker* v. *Van Winkle*, they might well have assumed that there were similar descriptions of land in other States where similar methods of survey were followed. The law does not require them to search the records in the surveyor general's office at Washington, or the records of other States, to determine whether there is any other like description. It is the universal custom in conveying lands in this State to describe the county and State, giving also the township and range. To hold with the defendants would be to overrule *Tucker* v. *Van Winkle*. That case has been regarded for two years and a half as the law of the State, and we are not disposed to overrule it. It follows that these notices were void on their face.

2. It is urged that the grantors of the original complainant have shown such laches as to preclude relief. Counsel state their position as follows:

"For 15 years the former owners have given them no attention and have permitted the State of Michigan to collect its taxes as best it might. They have known that through all this period the taxes have gone delinquent, or someone else has paid them."

Counsel cite, in support of their contention, the language of this court in *Cook* v. *Hall*, 123 Mich. 378. The provisions of the act of 1897, requiring notice to the origi-

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nal owner, and giving him the right to a reconveyance upon compliance with the terms of the notice, was not involved in that case. The facts there are not the parallel of those in this, except in the fact that both neglected to pay their taxes. In that case, the original owner, knowing that his lands had been sold, that the defendants had become the purchasers of the timber, and that it had been cut and manufactured, then sought to obtain the benefit of the labor and expenditures of the defendants. In this case the plaintiff, representing the original owners, took prompt action to prevent the cutting of timber, and to prevent the tax purchasers and their grantees from enforcing any rights under their tax deeds. The act of 1897 was not designed to assist only those who had been diligent and free from fault. The failure to pay taxes is, in most cases, the result of negligence and involves laches. The statute covers all cases where the purchaser has acquired the tax title at the public sales or by purchase of the title acquired by the State. It was regarded as sufficient punishment to the original owner and sufficient compensation to the tax purchaser to require the owner to pay double the amount which the purchaser paid and certain other items. To sustain this contention on behalf of the defendants would result in rendering the act of 1897 inapplicable to a great majority of tax titles. It may well be conceded that the complainant in this case, which stands in the shoes of the original owners, does not deserve any consideration in a forum of equity. Courts of equity, however, as well as of law, must apply legislative enactments in accordance with the plain intent and language used by the legislature. The requirements of the act are not difficult to understand, and compliance therewith is easy. He who relies upon the notices required by the statute must show a substantial compliance therewith, regardless of any fault or laches of the original owner. Had the complainant or its grantors stood by in silence and permitted defendants to proceed to cut the timber, the case of *Cook* v. *Hall* would probably be applicable.

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3. It is urged that the lands situated in Houghton county were purchased directly from the State at a time when the State held the indefeasible ownership therein, and that therefore defendant Alston took title free and clear of any right conferred by the act of 1897. The language of that act (Act No. 229, Pub. Acts 1897, § 142), is as follows:

"No purchaser under any tax sale hereafter made, or of any State tax land or any State bid hereafter sold, shall enter into possession of the land so purchased until six months after he has given notice to the party or parties in interest as provided for in the preceding sections unless he shall have acquired from said parties their title thereto under conveyance from said party or parties of his or their interest in said lands."

Section 140, as amended by Act No. 204, Pub. Acts 1899, provides:

"No writ of assistance * * * for the possession of any land, the title to which has been obtained under and in pursuance of any tax sale, made after the 29th day of August, A. D. 1897; or of any sale of State lands or State bids made after the said 29th day of August, 1897, * * * shall be issued until six months" after the notice has been served and proof thereof filed.

The title to many thousands of acres of land was in the State at the time the act of 1897 was passed. The title to many other thousands has since been acquired by the State. We think it was clearly the intention of the legislature to give to all the original owners of land the right conferred by the act of 1897, viz., to obtain a reconveyance of their land thereafter purchased, whether from the State directly or at tax sales, by paying the tax-title purchasers the amounts provided thereby. Such, we think, has been the understanding of the profession. Many cases have been before the courts where the title has been acquired from the State in the same manner as that acquired by the defendant Alston, and no question has before been raised as to the right to the benefit of the act.

The decree is affirmed, without costs to the complain-

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ant. Landowners who neglect the payment of their taxes should not receive costs when litigation has arisen through their own neglect.

BLAIR, MONTGOMERY, CARPENTER, and MCALVAY, JJ., concurred.

ON MOTION FOR REHEARING.

GRANT, C. J. A motion for a rehearing is made in this case, asking for the determination of the liability of the complainant for taxes paid by the defendant Alston for four years subsequent to the service of the notice which we held to be invalid. We did not determine this question in the former opinion, for the reason that it was not essential to a determination of the case. Upon reflection, we are of the opinion that the parties are entitled to have all their rights determined in this case; and, inasmuch as the question was fully discussed in the original briefs, upon the oral argument, and now upon the motion for a rehearing, we conclude to dispose of it.

As we have repeatedly held, the original owners of land know that their lands are subject to taxation, and that it is their duty to pay the taxes imposed upon them and thus bear their share of public burdens. The owners of the land in dispute not only paid no taxes, but after the notice was served upon them under the statute notifying them that a sale of the lands had been lawfully made, and that Alston had title thereto, and that they were entitled to a reconveyance upon payment of the sums specified in the notice, still paid no attention to the payment of their taxes or exhibited any desire to protect their interests. They made no attempt to pay either the defendant Alston in accordance with the notice, or the subsequent taxes. They were paid by Alston. It was necessary that they should be paid to protect his title, the validity of which is not questioned. By a technical defect in the notice the complainant (the grantee of the original owners) is still entitled to a reconveyance from the defendant. Is it equitable that complainant should be relieved

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from the payment of these subsequent taxes? Clearly not. Can a court of equity compel complainant to do equity by reimbursing the defendant Alston for these subsequent taxes? It seeks equity and ought to do equity. The law (section 3876, 1 Comp. Laws) provides:

"Any person having a lien on property may, after thirty days from the time the tax is payable, pay the taxes thereon, and the same may be added to his lien, and recovered with the rate of interest borne by the lien."

The name given to the title acquired by the tax purchaser under the provisions of the law is immaterial. Whether we call the title absolute or conditional, he has a title which it is his right to protect by payment of subsequent taxes, and, when the original owner demands a reconveyance from him, he ought in justice and equity to be compelled to pay those taxes which the purchaser has been compelled to pay, or otherwise lose his title or lien. A mortgagee is entitled to pay taxes and to have an additional lien upon the land therefor, although the mortgage is silent as to the payment of taxes. *Sidenburg* v. *Ely*, 90 N. Y. 262; 2 Jones on Mortgages (6th Ed.), § 1080; 3 Pomeroy on Equity Jurisprudence (3d Ed.), § 1217.

It is also held that where a party pays the taxes in good faith, claiming title but having none, he is entitled to a reimbursement out of the land. *Kemp* v. *Cossart*, 47 Ark. 62; *Goodnow* v. *Moulton*, 51 Iowa, 555. The payment of the subsequent taxes, amounting to $573.37, inured to the benefit of the original owners. The complainant (representing the original grantors), not the defendant Alston, is demanding "the pound of flesh." Equity will not give it. Defendant Alston is entitled to be reimbursed for these taxes, with interest from the dates of payment.

The decree will be modified in accordance with this opinion.

BLAIR, MONTGOMERY, CARPENTER, and MCALVAY, JJ., concurred.

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DAHLEM v. ABBOTT.

1. EJECTMENT—TITLE TO SUPPORT—TITLE BY PRESCRIPTION.
   Title by prescription is a complete title, and will sustain an action of ejectment as well as a record title.

2. SAME—EVIDENCE—TITLE BY PRESCRIPTION.
   Where plaintiff in ejectment shows that her ancestor took possession with her family nearly 40 years ago under certain deeds introduced in evidence, and that her heirs have remained continuously in possession ever since, there is sufficient evidence of title by prescription to sustain a verdict.

3. SAME—OUSTER—WHAT CONSTITUTES.
   The acquisition of a tax deed by a tenant in common, claim made thereunder, and the statement of the co-tenant in possession that she holds under the tax title holder in consequence of the tax title, are sufficient evidence of ouster of another co-tenant to support ejectment.

Error to Muskegon; Padgham, J., presiding. Submitted April 17, 1908. (Docket No. 118.) Decided July 1, 1908.

Ejectment by Lucy Dahlem against John Abbott and others. There was judgment for defendants on a verdict directed by the court, and plaintiff brings error. Reversed.

Stephen H. Clink, for appellant.

Nims, Hoyt, Erwin & Vanderwerp, for appellees.

GRANT, C. J. This case is before us the second time. A full statement can be found in the opinion then rendered. (146 Mich. 605.)

Defendant Abbott, upon the first trial, claimed under

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a tax title and title by adverse possession. It was held that he had not acquired title by adverse possession, and that he could not under the facts there disclosed acquire a valid tax title as against plaintiff and the other defendants. The judgment was reversed and a new trial ordered. Upon the second trial plaintiff produced two deeds, one made to Vesula Converse and the other to Virsula Converse. Counsel for plaintiff, in his opening statement, stated that the property was formerly owned by Ursula Converse, and that she died in 1872. Plaintiff gave evidence tending to show that under these deeds Ursula Converse took possession and remained in possession until her death, about three years after, and that her heirs, the defendants, except defendant Abbott, who married one of the daughters, have remained in possession ever since, and that upon the death of Mrs. Abbott, the daughter of Mrs. Converse, in 1887, Mr. Abbott and his children moved in and lived with the others until about two years before the trial of this cause. Plaintiff also gave evidence showing that defendant Abbott claimed title by virtue of his tax deed. Defendant Matilda testified that defendant Abbott claimed to own the property, and that she held it subject to him. Defendant Abbott alone defends.

After the plaintiff had rested, the court, at the request of the defendant, directed a verdict for him upon the ground that plaintiff had failed to show a record title. We think the court erred. Title by prescription is a complete title, and will sustain an action of ejectment as well as a record title. Plaintiff's testimony tended to show that Mrs. Converse took possession of this land with her family, under the deeds introduced in evidence, nearly 40 years ago, and that her heirs have remained continuously in possession ever since. This was evidence of title acquired by prescription. The acquisition of a tax deed, claim made thereunder, and the statement of Matilda that she held under him in consequence of the tax title,

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are evidence of ouster. *Whiteley* v. *Whiteley*, 110 Mich. 556; *Carpenter* v. *Carpenter*, 119 Mich. 167.

The court erred in directing a verdict, and the judgment is reversed, and a new trial ordered.

BLAIR, MONTGOMERY, CARPENTER, and MCALVAY, JJ., concurred.

PETERS v. EATON CIRCUIT JUDGE.

153 467
156 643
156 644

INTOXICATING LIQUORS—CRIMINAL LAW—INFORMATIONS—NEGATIVING DEFENSES—DRUGGISTS—LICENSE—QUASHING INFORMATION.

On mandamus to compel the vacation of an order quashing an information for the violation of the liquor law, the writ is denied by a divided court; Mr. Justice CARPENTER, with whom concur Justices OSTRANDER, HOOKER, and MCALVAY, writing for a denial of the writ on the ground that the information which charges the accused with "being then and there a person whose business consists in part in the sale of drugs and medicines," etc., is fatally defective in that it fails to set up that accused had given the bond prescribed by section 5381, 2 Comp. Laws; Mr. Justice MONTGOMERY, with whom concur Chief Justice GRANT and Justices BLAIR and MOORE, writing for the issuance of the writ on the ground that the information charges all the essential ingredients of the offense as defined by the statute, and that if subsequent provisions of the statute introduce exceptions it is not necessary for the pleader to negative them.

Mandamus by Elmer N. Peters, prosecuting attorney, to compel Clement Smith, circuit judge of Eaton county, to vacate an order quashing an information. Submitted May 5, 1908. (Calendar No. 22,821.) Writ denied by a divided court July 1, 1908.

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Elmer N. Peters, in pro. per.

Garry C. Fox (*L. H. McCall*, of counsel), for respondent.

Relator filed an information in the circuit court for the county of Eaton of which the following is the material part:

"Fred H. Emery * * * on the 31st day of August, 1907, at the city of Charlotte, in said county, did sell, furnish and deliver to Ira Ball, certain spirituous, malt, brewed, fermented, vinous and intoxicating liquors, to wit, one bottle of beer to be used as a beverage. He, the said Fred H. Emery, being then and there a person whose business consists in part in the sale of drugs and medicines, and said liquors not being then and there sold for chemical, scientific, medicinal, mechanical or sacramental purposes only, and in strict compliance with law, contrary to the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

The respondent quashed said information upon the ground that the information charged no crime. Relator seeks a mandamus compelling the vacation of said order.

CARPENTER, J. (*after stating the facts*). Under the laws of this State (2 Comp. Laws, § 5380) every person who sells liquor "in quantities of three gallons or less, or one dozen quart bottles or less, at any one time," is a retail liquor dealer, unless he has given the druggist's bond prescribed by section 5381, 2 Comp. Laws, authorizing him to sell liquor for medicinal purposes. *People* v. *Utley*, 129 Mich. 628; *People* v. *Wilcox*, 152 Mich. 39. Emery, the respondent named in the information before us, is not charged with the offense of selling as a retail liquor dealer, nor could he be convicted of that offense because there is no averment in the information "that he has not given the retailer's bond prescribed by section 5386." *People* v. *Utley*, supra. No offense, then, is charged against respondent Emery as a retail dealer of

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liquors. Is he charged with the offense of making a sale as a druggist contrary to the provisions of section 5381, 2 Comp. Laws? To bring his case under that section, the logic of *People* v. *Utley* requires the information to show by some proper averment that he had given the bond prescribed therein authorizing him to sell liquor for medicinal purposes. It is quite clear that the information contains no such averment. It merely avers that his business "consists in part in the sale of drugs and medicines." Surely no one would infer from this that he had given a bond authorizing him to sell liquor for medicinal purposes. We are therefore of the opinion that the information charged no offense, and that it was properly quashed by respondent.

This reasoning is not, in our judgment, opposed to *People* v. *Curtis*, 95 Mich. 212, relied upon by relator. There the information charged that respondent therein named "being then and there a druggist * * * did then and there sell, furnish, and deliver a quantity of spirituous liquor, called 'brandy,' to wit, three drinks of brandy, to one Clinton D. Shoemaker, to be used as a beverage, which said brandy was then and there drank on the premises of said Orrin Curtis." The sufficiency of this information was assailed because (I quote from the brief filed by appellant's counsel in that case):

"There is no charge in the information or other papers that the respondent was not then and there and at the time a saloon keeper with a license and right under the laws of the State to sell the liquor mentioned in said information."

We overruled this contention, and that decision is authority for the proposition that it was unnecessary for the information to contain the averment insisted upon. It is true that the opinion in *People* v. *Curtis* states that "the information was sufficient." This means, of course, merely this, that it was not open to any of the objections made by counsel. It is not to be taken as authority for the proposition that it was open to no other objection.

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That case may not be regarded, then, as authority for the proposition that to charge an offense under section 5381 it is sufficient to aver that the person charged with the crime was a druggist. It would certainly be better and safer practice to charge that he had given the bond permitting him to sell as a druggist liquor for medicinal purposes. Even if *People* v. *Curtis* is authority for the proposition that, to charge an offense under section 5381, it is sufficient to aver in the information that the offender is a druggist, it would not govern this case, for there is a manifest distinction between a "druggist" and one whose business "consists in part in the sale of drugs and medicines."

It seems to be thought by some of the counsel in this case that the *Utley Case* decides—contrary to the holding in the *Curtis Case*—that an information charging a druggist with making an unlawful sale must negative his having given a bond as a retail liquor dealer. It does not so decide. It does decide, to repeat, that, as Utley had failed to give the druggist's bond, he was a retail dealer of liquors, and that the information charged no offense "because it does not state that he has not given the retailer's bond."

Since this opinion was prepared, relator has filed a brief calling our attention to *People* v. *Hinchman*, 75 Mich. 587 (4 L. R. A. 707). There respondent Hinchman, under an information substantially like that before us, was convicted for making a sale of liquor as a druggist contrary to the provisions of section 5381, 2 Comp. Laws. We sustained that information. The only objection that was made to the information was this, "it does not show or allege that the said liquors were sold to be used as a beverage." The point that it failed to aver that Hinchman was a druggist was not made and that question was not, therefore, considered. For that reason the case has no bearing.

The mandamus is denied.

OSTRANDER, HOOKER, and MCALVAY, JJ., concurred with CARPENTER, J.

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MONTGOMERY, J. This is an application for a mandamus to require the circuit judge to vacate an order quashing an information filed in his court, the material part of which was as follows:

"Fred H. Emery * * * on the 31st day of August, 1907, at the city of Charlotte, in said county, did sell, furnish and deliver to Ira Ball, certain spirituous, malt, brewed, fermented, vinous and intoxicating liquors, to wit, one bottle of beer to be used as a beverage. He, the said Fred H. Emery, being then and there a person whose business consists in part in the sale of drugs and medicines, and said liquors not being then and there sold for chemical, scientific, medicinal, mechanical or sacramental purposes only, and in strict compliance with law, contrary to the statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan."

The question is whether this information charges an offense. It is to be noted that the information is in form such as has been employed in the different circuits of the State for at least 20 years. See *People* v. *Hinchman*, 75 Mich. 587 (4 L. R. A. 707); *People* v. *Curtis*, 95 Mich. 212. While this is not of controlling force, it is a circumstance that challenges careful consideration of the question.

The statute, section 5381, 2 Comp. Laws, being a portion of "an act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving or delivering spirituous and intoxicating liquors," etc., provides in terms (section 5381):

"It shall not be lawful for any druggist, nor for any person whose business consists in whole or in part of the sale of drugs and medicines, directly or indirectly, by himself, his clerk, agent or servant, at any time, to sell, furnish, give, or deliver, any spirituous, malt, brewed, fermented or vinous liquor, or any mixed liquor, a part of which is spirituous, malt, brewed, fermented or vinous, * * * nor to any other person to be used as a beverage."

It is obvious from a casual reading of this information

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that it charges all the essential ingredients of the offense as defined by the statute quoted. That statute makes it an offense for any druggist, or for any person whose business consists in whole or in part of the sale of drugs and medicines, to sell liquor to be used as a beverage. In the case of *People* v. *Curtis*, supra, one of the errors assigned was that the information, which was in all material respects like the one under consideration, set forth no offense known to the laws of the State. In dealing with that question, the court, in its opinion, stated that one of the grounds of error was that the information was insufficient. The holding was that the information was sufficient, and upon the ground that all the statutory conditions which by section 5381, 2 Comp. Laws, are declared to constitute the offense, are set out. It was said:

"It is claimed that the information should show negatively that the respondent was not licensed to keep a saloon under other sections of the statute."

The answer to this was:

"The rule of pleading, however, in either civil or criminal cases does not require this. [Citing cases.] The rule is that in pleading a statute which contains an exception in the enacting clause the party pleading must show that his adversary is not within the exception; but, if there be an exception in a subsequent clause or subsequent statute, that is matter of defense, and is to be shown by the other party."

The case of *People* v. *Utley*, 129 Mich. 628, is relied upon. It will be noted that the charge in that case was that he was a druggist and had sold liquors without giving a druggist's bond. It was said that the liquor law—

"Contains a requirement that all persons who wish to engage in the sale shall file a bond of a prescribed form, and excepts from this provision druggists who see fit to file a bond of different form, also prescribed. Until a druggist files the latter bond, he is within the former provision, and is a retailer if he sells liquor in quantities of three gallons or less."

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It was further said:

"No druggist sells liquor in compliance with law until he gives a bond."

And it is further stated:

"The law does not prohibit a druggist from being a retailer of liquor, provided he is willing to pay the tax and give the retailer's bond; but it does permit him to sell for certain purposes, and in certain methods, without giving the retailer's bond, if he gives another bond, and not otherwise."

The question presented in that case is markedly different from the one which we are considering. The question is not presented on this record as to whether the respondent on the trial might or might not be able to aver and prove that he comes within an exception to the terms of this statute by showing that under a later provision of the statute he has given a bond to engage in the business of selling liquor generally. The point is, as is held in *People* v. *Curtis*, that when the pleader has set out all the essential ingredients of the offense as defined by the statute, no exception engrafted upon that statute by a subsequent section—if by implication it be held that such an exception is engrafted upon the statute—is a matter of defense, and need not be negatived in the information.

Section 5381 contains other provisions regulating the selling of liquor by druggists. It authorizes the sale of liquor by druggists for certain purposes upon complying with certain restrictions and conditions, among which is the giving of a bond in a prescribed form. The question is whether, in a prosecution where the people prove that the respondent is a druggist, and that he has sold liquor as a beverage, it is essential, in order to make out the case, to show that he has violated other provisions of the same section. I think not. The language of the section quoted in this opinion very clearly defines the offense and makes the offense to consist of any druggist, or any person whose business consists in whole or in part in the sale of

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drugs and medicines, selling liquor to any person to be used as a beverage. If the fact is proven that the respondent is a druggist, and that he has violated this provision of the statute, it would seem that it would be but an aggravation of the offense that he had also failed to comply with other provisions of the statute relating to druggists.

The writ should issue as prayed.

GRANT, C. J., and BLAIR, and MOORE, JJ., concurred with MONTGOMERY, J.

HURD *v.* NORTHERN ACCIDENT CO.[1]

LIFE INSURANCE—ACTION ON POLICY—PLEADING—AMENDMENT.

Where, in an action on a policy of insurance, the declaration counted on a policy which had lapsed, and, in response to a demand for a bill of particulars stating specifically the date and amount of the policy referred to in the declaration, the plaintiff filed a bill which mentioned a second policy as well as the first, this, in legal effect, was the same as if both policies had been declared upon, and no amendment was necessary to make the second policy admissible in evidence.

Error to St. Clair; Tappan, J. Submitted May 5, 1908. (Docket No. 41.) Decided July 1, 1908.

Assumpsit by Martha J. Hurd against the Northern Accident Company on a policy of insurance. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

[1] Rehearing denied September 10, 1908.

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William T. Hosner (*Lincoln Avery* and *Byron R. Erskine*, of counsel), for appellant.

Henry C. Walters, for appellee.

MOORE, J. We state as many of the facts as are material to the questions involved here. This is an action commenced to recover upon a policy of insurance issued by the defendant to Charles L. Hurd, plaintiff's deceased husband. The defendant company on September 20, 1901, issued a policy of accident insurance to Mr. Hurd, No. 23,816, for the sum of $500. This policy was suffered to lapse. A new policy was issued on August 22, 1904, being No. 46,126, for $500. Mr. Hurd died September 3, 1904, the evidence tending to show his death was caused by an accident covered by the policy in question. His widow, on September 5th following, caused the company to be duly notified of his death by a letter written for her by Dr. Hodges, at the same time requesting it to forward (blank) proofs of death. Proofs of death were duly made and filed under policy No. 46,126 and no other. Liability being denied by defendant, this action was commenced by a summons in the Macomb circuit court, on January 31, 1905, and service thereof duly made on defendant. February 21st a declaration was filed. Defendant pleaded the general issue and gave notice of special defenses. Later it demanded a bill of particulars. A bill of particulars was furnished.

On the trial, plaintiff claimed that no claim whatever had been made by plaintiff under the first policy, or that any proofs of loss had been furnished thereunder, and that by mere accident the declaration referred to the date of the first policy. The trial court held that the policy of August, 1904, was inadmissible under the declaration, and that the declaration could not be amended, because it would introduce a new cause of action. The judge refused the request to amend because he thought he did not have the power to allow it. The case is brought here by writ of error.

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The defendant claims the second policy was inadmissible because the declaration was upon the first policy. It insists the declaration could not be amended because it would introduce a new cause of action after the time in which suit might be brought had expired. To pass intelligently upon the questions presented, it will be necessary to state somewhat more fully the condition of the pleadings.

No policy was set out in full in the declaration. The reference made thereto which is material to the question presented is as follows:

"For that the said defendant, which is a corporation organized, existing and doing business under the laws of said State, and duly authorized to enter into the contract hereinafter mentioned, on, to wit, September 20th, 1901, at said county, on the application of Charles L. Hurd, the husband of said plaintiff, made a certain policy of insurance in writing, whereby the said defendant," etc.

As before stated, the attorney for the defendant pleaded the general issue with notice of special defenses. Not content with doing this, on the 20th of December, 1905, he filed a demand in writing, for a bill of particulars, in which the following language was used:

"I herewith demand that you furnish the defendant with a bill of particulars of the plaintiff's claim in this suit, stating specifically the date and amount of the policy of insurance referred to in your declaration, as required by Circuit Court Rule 3 of the Revised Rules of Practice in the Courts of Michigan, adopted October 8, 1896."

Complying with this demand, a bill of particulars was furnished at once and before the time would expire in which suit could be brought, in which the following statement is made:

"This action is brought to recover money due under policy issued by the defendant company to one Charles L. Hurd, Sept. 20th, 1901. Amount of policy, $500. This action is brought to recover money due under policy issued by defendant company to one Charles L. Hurd, August 22, 1904. Amount of policy, $500."

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It will be observed that the reference in the declaration to the policy of insurance did not comply with the requirements of Circuit Court Rule 3. The attorney for the defendant recognized this condition and asked for more specific information. This he got when he received the bill of particulars. At this time he was informed that plaintiff claimed defendant was liable on the policy of August 22, 1904. This being the situation, we do not think it necessary to decide whether the judge had the power to permit the amendment.

We think the so-called bill of particulars filed and served in response to defendant's request was in effect a part of the declaration. In asking for this bill of particulars, defendant said: "I demand a statement of the date and amount of the policy referred to in your declaration." In answer, plaintiff gave the date and the amount of the second policy as well as the first. Legally speaking, this is the same as if plaintiff had stated in her declaration the dates and amounts of the two policies. There was therefore no occasion to make an amendment, and defendant had no right to insist that an amendment was necessary.

Judgment is reversed, and new trial ordered.

OSTRANDER, HOOKER, CARPENTER, and MCALVAY, JJ., concurred.

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VAUGHAN *v.* WAYNE CIRCUIT JUDGE.

ACTION—STAY OF PROCEEDINGS—COURTS—POWERS.

A court has general power to postpone the hearing of an action at law until after the hearing of a suit in chancery involving the same matters when both causes are before it, and the determination of the chancery suit will conclude all of the parties to the action at law, while the determination of the law case would not bind all of the parties in the chancery case.

Mandamus by Jay W. Vaughan and Joseph C. Dumont, copartners as Vaughan & Dumont, to compel Flavius L. Brooke, circuit judge of Wayne county, to set aside an order denying a motion to advance a law case upon the docket. Submitted May 26, 1908. (Calendar No. 22,884.) Writ denied July 1, 1908.

Choate & Webster (*Leo M. Butzel*, of counsel), for relators.

C. K. Latham and *W. C. Stuart*, for respondent.

HOOKER, J. The relators were subcontractors under Goddard, who was principal contractor, in relation to certain work upon the Ford building in Detroit. They claim to have performed that work, and on March 19, 1907, they filed a claim of lien. On March 21, 1907, they filed a bill to enforce said lien. The defendants in that proceeding were Goddard, the contractor, and Ford, the owner of the premises. Goddard answered April 30th, Ford May 27th. Replications to these answers were filed May 3d and June 7th, respectively. On June 7th a notice of taking testimony in open court was filed.

On March 22d relators began an action at law against Goddard for $39,879.01 for the same claim, and plea was

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filed on May 18, 1907. Both cases were in the Wayne circuit.

On April 10, 1908, there was a call of the chancery docket, and the lien case was called in its regular order for hearing, when relators' counsel stated that he thought that it would be impossible for Dumont, one of the complainants, to be present, and that he was a material witness. Defendant's counsel then stated that they were ready to proceed to the hearing of the chancery case, but did not wish to force the case to a hearing until Dumont could be present, and the court then passed the case to the next call.

Four days later, Dumont having returned to the city, relators filed a motion to have the law case advanced on the docket, and set for trial before May 1, 1908. The motion was based on an affidavit of said Dumont, stating that he was soon to go west and would not be able to return for the trial of said cause. The presiding judge thereupon stated that, under the facts as they appeared, he was of the opinion that relators should either first try the chancery case or discontinue the same, and that he would deny the motion to advance the law case and set it for trial before May 1st.

On April 30, 1908, the law case was called in its regular order to be set for trial, and respondent refused to set the same for trial, without first dismissing or trying the chancery cause. On May 15, 1908, relators' counsel insisted that as the case had been reached in its regular turn to be set for trial, they had a right to proceed to judgment therein, without first trying or dismissing the chancery cause, and the respondent then took the question up with all of his associates, except one who was absent, and all being of the opinion that the chancery cause should be tried first, respondent then refused to set said law case for an early date. Thereupon the chancery cause was set for hearing by Judge Rohnert on May 19, 1908. Afterwards a stay of proceedings was granted in that cause, pending the determination of this proceeding,

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which is an application for mandamus to compel the trial court to set aside the order made by respondent, and to bring on said law case for trial forthwith.

The return shows that relators seek a personal decree against defendants, and that in the law case relators commenced garnishment proceedings and defendant Goddard gave a surety company's bond in double the amount claimed by relators to release such garnishment proceedings and pay any judgment recovered by them. Also that a judgment in the law case will not determine the controversy in the chancery proceeding.

That a judge may postpone the hearing of an action at law until after the hearing of a cause in chancery involving the same matter, has been frequently held when both causes are before him, and in many cases the same power has been exercised when the chancery cause is before another court,—a very different proposition from an order attempting to stay the proceedings pending in another court. This is a case warranting such procedure, if any case is, for the reason that every question involved in the law case is also before the court of chancery, and while the determination of the law case would not bind all of the parties in the chancery cause, all parties in both cases will be concluded as to every question decided in the chancery cause. This power is a general one and extends beyond the class of cases of which this is a sample, as will be seen from the authorities hereinafter cited. It is unnecessary to discuss its limitations, it being sufficient to say that the authority covers this case. The case of *Purington* v. *Frank*, 2 Iowa, 565, is a similar case to this in many respects. See, also, *Hammond* v. *Baker*, 3 Sandf. (N. Y.) 704; *Flanagan* v. *Flanagan*, 13 N. Y. St. R. 432; *Soule* v. *Corning*, 11 Paige Ch. (N. Y.) 412; *Burlingame* v. *Parce*, 12 Hun (N. Y.), 149; *Brown* v. *May*, 17 Abb. N. Cas. (N. Y.) 205; *Cushman* v. *Leland*, 93 N. Y. 652; *Den* v. *Matlack*, 17 N. J. Law, 354; *Hutchins* v. *Riddle*, 12 N. H. 464; *Adams* v. *Manning*, 17 Mass. 179, 180; *Parmalee* v. *Wheeler*, 32 Wis. 429; *Jones* v. *Pritchard*,

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6 D. & L. Pr. Cas. 529; *Carne* v. *Legh*, 6 B. & C. 124.

See *Joslin* v. *Millspaugh*, 27 Mich. 517, which recognized the doctrine of election of remedies; *McGunn* v. *Hanlin*, 29 Mich. 476, 479.

The writ is denied.

MONTGOMERY, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

GLAZIER v. INGHAM CIRCUIT JUDGE.

1. MANDAMUS—CHANGE OF VENUE—MATTERS CONSIDERED—MATTERS NOT PRESENTED BELOW.
   On mandamus to compel a circuit judge to set aside an order denying a change of venue, matters contained in the petition and brief for relator that were not presented to the circuit judge, and were not within the grounds assigned in the motion, will not be considered.
2. CRIMINAL LAW—VENUE—CHANGE—RIGHT OF ACCUSED.
   The defendant in a criminal case has no absolute right to a change of venue; such right depending upon a showing of cause.
3. SAME—DENIAL—DISCRETION OF COURT—CONTROL BY MANDAMUS.
   Where the showing made to secure a change of venue in a criminal case is met by counter affidavits which call for the exercise of the sound judgment and discretion of the circuit judge, his decision ought not to be disturbed by this court by mandamus except in case of a clear abuse of discretion.
4. SAME—SUFFICIENCY OF SHOWING—ABUSE OF DISCRETION.
   Where the most of the showing in support of a motion for a change of venue in a criminal case would apply to all the populous counties of the State, and the showing of actual prejudice is met by counter affidavits which call for an exercise of sound judgment on the part of the circuit judge, no abuse of discretion in denying the motion appears.

Mandamus by Frank P. Glazier to compel Howard Wiest, circuit judge of Ingham county, to vacate an order denying a change of venue. Submitted May 26, 1908. (Calendar No. 22,864.) Writ denied July 1, 1908.

J. S. Gorman and *A. J. Sawyer*, for relator.

Walter S. Foster, Prosecuting Attorney, for respondent.

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PER CURIAM. Three indictments have been returned and filed against relator upon presentment by a grand jury for the county of Ingham charging him with criminal violations of his official duties as State treasurer.

For the purpose of obtaining a change of venue, relator applied to respondent, by motion supported by affidavits of his son, of Mr. Gorman, his attorney in the criminal cases, and of Mr. Kirkby, attorney, of the city of Jackson, requesting that the venue be transferred to Jackson county. The grounds of the motion are as follows:

"1. Because the defendant cannot have a fair and impartial trial in the circuit court for the county of Ingham aforesaid, upon the three indictments filed against him for that Fred M. Warner, the governor of the State of Michigan, has, by his personal, official and political influence, prejudiced and poisoned the people of the county of Ingham against this defendant.

"2. This defendant cannot have a fair and impartial trial on the three above named indictments, in the said county of Ingham, because of the inaccurate, partial and prejudicial accounts of the defendant's transactions involved in each of said prosecutions under each of said indictments, published by the newspapers of Ingham county and the newspapers published outside of said county and circulating therein.

"3. This defendant cannot have a fair and impartial trial in the said county of Ingham because of the fact that the three indictments found against this defendant by the grand jury of Ingham county at the January term, 1908, consisting of, to wit: twenty men, selected from all parts of the county of Ingham and residents of said county, have aroused public attention and caused such comment, not only in the public newspapers circulated in said county, but in the immediate neighborhood and among the friends and associates of each of said jurors respectively, causing said people to form fixed opinions on the subject of the guilt of defendant as charged in each of said indictments respectively.

"4. This defendant cannot have a fair and impartial trial in said county of Ingham because of the suspension of the Glazier & Gay bank at Stockbridge, in said county, in which many residents of said county were depositors in said bank, who, bearing great loss of their de-

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posits, believe said defendant guilty as charged in each of said indictments respectively.

"5. This defendant cannot have a fair and impartial trial in said Ingham county because of the personal, official and political influence of Governor Warner against this defendant; because of the prejudice and bias occasioned by the actions of the grand jury towards this defendant; because of the newspaper publications in Ingham county and papers circulated in Ingham county, giving inaccurate and prejudiced statements with reference to defendant's official conduct; because of the failure of the Glazier & Gay bank at Stockbridge, which occasioned much comment and criticism by the people in that part of Ingham county against this defendant, causing great local prejudice therein, and causing much odium attached to this defendant."

Respondent denied the motion, making the following statements orally in connection therewith:

"It should be kept in mind that the respondent is not and has not been a resident of Ingham county and that the indictments against him relate to his doings while he was State treasurer and the venue is here because the Capitol is in this county.

"The cases are local, only because the venue must be laid here at the seat of government. The principal affidavit in support of the motion is that of the respondent's son who lives in Washtenaw county, and who neither deposes on actual knowledge of local conditions here, nor discloses the sources of the information upon which he bases his conclusion—at least, that is the opinion I get from his affidavit.

"This court cannot take judicial notice that the governor of this State, by personal, official or political influence, moves the people of this county any more than those of Jackson or any other populous county, and can give little or no weight to respondent's son's conclusion that the governor has poisoned the minds of our people against his father.

"The newspaper clippings are from a Detroit paper of State-wide circulation and of which the people here are no more partial than those in Jackson county.

"The failure of the Glazier & Gay private bank at Stockbridge affected the people in the extreme southern part of the county, and socially and commercially, it is

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safe to say, the people there are, by reason of direct railroad communication, more closely allied to Jackson than Lansing or Mason, and the three jurors from Stockbridge, White Oak and Ingham can easily be excused from sitting in the case. That because twenty grand jurors from all parts of the county presented the indictments should cause the trial to be held in some other county would be so novel a ground, if considered good cause, as to astound the States where all persons must be put on trial by way of indictment, and cannot be taken as good cause.

"A statutory proceeding by the people, and once the only method of procedure, and yet maintained by the Federal government and many States, cannot be considered prejudicial to the right of fair and impartial trial. The respondent is of right entitled to a fair and impartial trial and no good cause is shown to exist to prevent him from enjoying such right in this county."

Relator applied to this court for the writ of mandamus to require respondent to grant his motion, and the matter is now before us upon respondent's return to the order to show cause. Such matters contained in the petition and brief for relator as were not presented to the respondent and not within the grounds assigned in the motion are not proper for our consideration, and are, therefore, disregarded.

Thirty counter affidavits were filed in behalf of the prosecution, from residents of the cities of Lansing and Mason and from each of the townships in the county, in which each of the affiants swore as to his community:

"That in said community there has been some discussion of the indictments against said Frank P. Glazier, now pending in the said court and that he is familiar with the public sentiment in said community toward said Frank P. Glazier; that the people of said community have not, by reason of the personal, official or political influence of Fred M. Warner, by the publishing of the newspaper accounts referring to said indictments, by the action of the recent grand jury in said county, by the suspension of the Glazier & Gay bank at Stockbridge, nor for any other reason, become so prejudiced, biased or poisoned against Frank P. Glazier that it would be impossible to give said

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Frank P. Glazier a fair and impartial trial in said county of Ingham upon said indictments.

"Deponent further says that he has good reason to believe and does firmly believe that a fair and impartial jury for the trial of said Frank P. Glazier on said indictments could be readily obtained in said Ingham county."

The strongest showing as to local prejudice is that contained in the affidavit of Mr. Kirkby, relating to the sentiment in the village of Stockbridge. This affidavit is met by the affidavit of William Craig of the township of Stockbridge, and, even if its force were unimpaired, would not alone be sufficient to require this court to reverse the ruling of the respondent. 4 Enc. Pl. & Prac. p. 398 (3).

The defendant in a criminal case has no absolute right to a change of venue. Such right depends upon a showing of cause to be made by him. And where, as in this case, most of the showing made would apply to all of the populous counties in the State, and the showing of actual prejudice is met by counter affidavits which call for the exercise of the sound judgment and discretion of the circuit judge, his conclusion ought not to be disturbed by this court except in case of a clear abuse of discretion. *People* v. *Peterson*, 93 Mich. 27; 12 Cyc. p. 243 *d*.

We find no evidence of any abuse of discretion on the part of respondent, and the writ is denied.

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ALLPORT *v.* MURPHY.

1. MANDAMUS—RETURN—CONCLUSIVENESS.

   Where a mandamus case is heard on the petition and answer to the order to show cause, averments of the answer must be assumed to be true.

2. HAWKERS AND PEDDLERS—MEANING OF TERMS—WHO ARE INCLUDED.

   The popular meaning of the words "hawker" and "peddler," and the meaning indicated by the derivation of the words, involves ideas both of the carrying of goods for sale and of an itinerant vender.

3. SAME — ORDINANCES — LEGAL TERMS — VALIDITY — MUSKEGON CHARTER.

   The charter of Muskegon empowers the common council "to license hucksters, peddlers * * * in the business of hawking and peddling, and to regulate the sale by peddling (directly or by canvassing for subscription) of goods, wares, merchandise * * * by persons going about from place to place in the city for that purpose." (Act 469, Local Acts 1895, title 7, § 24, subd. 8.) An ordinance of the city provided: "Any person or persons who shall go about from house to house or place to place and sell or offer to sell any article of trade or commerce to be delivered then or in the future shall be deemed a hawker and peddler within the meaning of this ordinance." A warrant for the arrest of one charged with going about from place to place in the city taking orders for teas, coffees and baking powders, etc., from persons who were not dealers in these commodities, was refused upon the ground that such person was a citizen merchant who solicited orders and filled the same from goods kept in his store, and that such method of conducting his business did not make him a hawker and peddler under the general statutes, the charter or the ordinance. *Held*, that the common council did not attempt to prescribe by the ordinance a new definition for the legal terms "hawker" and "peddler," but the ordinance was only an exercise of its charter power, and, applying alike to all persons, was valid.

Certiorari to Muskegon; Sessions, J. Submitted

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June 2, 1908. (Calendar No. 22,782.) Decided July 1, 1908.

Mandamus by John C. Allport to compel Patrick Murphy, a justice of the peace, to issue a warrant for the violation of an ordinance. There was an order denying the writ, and relator brings certiorari. Reversed, and writ granted.

James E. Sullivan, for relator.

Cross, Lovelace & Ross, for respondent.

The respondent, justice of the peace and police justice of the city of Muskegon, refused to issue a warrant upon the complaint of relator, charging one Archibald Bryant with violation of an ordinance entitled: "An ordinance relative to hucksters, peddlers, hawkers and street venders." Relator is license collector for the city and respondent the only judicial officer of the city not disqualified to hear the matter. An order to show cause why he should not receive the complaint and issue a warrant was made by the circuit court for Muskegon county; cause was shown, and, upon a hearing upon the petition and return, a writ of mandamus was refused.

Section 1 of the ordinance reads:

"No person or persons shall engage in the business of hawking, pack or other peddling in the streets or other public places or from door to door, or in selling any article of trade or commerce whatsoever from a stand, stall, cart, wagon, pack, basket, or in any manner on any public street, parks, grounds, alleys, or places in the city of Muskegon, without first having obtained license therefor."

After setting out the method of obtaining a license, it is provided in section 6:

"Any person or persons who shall go about from house to house or place to place and sell or offer to sell any article of trade or commerce to be delivered then or in the future shall be deemed a hawker and peddler within the meaning of this ordinance."

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The penalty for violation of the ordinance is a fine and costs, and, in default of payment of such fine, imprisonment in the county jail, and there may be imposed a sentence of both fine and imprisonment. The complaint filed with the magistrate set out that the said Bryant was a resident and taxpayer of the city of Muskegon and owner of a small store on Washington avenue in that city, where he kept teas, coffees, and baking powders for sale in the usual course of trade; that the wife of said Bryant or someone else had charge of the store during his absence; that the store had been established since May 1, 1907. It is alleged in the complaint that for a period of three months next after July 5, 1907, the said Archibald Bryant—

"Did go from door to door and from house to house in said city of Muskegon taking orders for teas, coffees, and baking powders, in small quantities, to wit: for two pounds, one pound, and half pound quantities, from persons who were not dealers in such teas, coffees or baking powders. That the said teas, coffees, and baking powders were not delivered at the times in which the orders were taken but were afterwards put up by the said Archibald Bryant or under his direction from his stock of trade in the store aforesaid in the quantities so ordered by the different persons aforesaid, and thereafter delivered * * * to the persons so ordering them at their residences. * * * That the said Archibald Bryant did not confine his business as aforesaid to old customers but went from house to house and door to door in said city during the time aforesaid serving old customers and getting new customers. * * * That the said teas, coffees, and baking powders, in packages as ordered, were carried in a wagon and delivered to the persons that had ordered the same, by the said Archibald Bryant."

It is set out that this was the principal business of the said Bryant, in which his time was principally employed, and that he had not obtained a license and had not paid the fee necessary to obtain a license, and that he was engaged in the business of peddling teas, coffees, and baking powders without first having obtained a license therefor. In the answer to the order to show cause, respond-

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ent set out various reasons for his refusal to issue the warrant. He averred that the complaint stated no offense because it was not a violation of the ordinance for a citizen and taxpayer to solicit orders and fill the same from goods kept in his store in the manner mentioned in the complaint, and that such a method of conducting his business did not make him a hawker or peddler under the laws of the State, the charter, or the ordinance; that the said Bryant not only sold at retail in his store teas, coffees, and baking powders, but also, and in the usual and customary manner of retail merchants, he kept and sold bottled mustard, cocoa, all kinds of spices and extracts, starch, tapioca, soda, rice, canned goods, breakfast foods, oatmeal, soaps, bluing, ammonia, crockery, tin and glassware, furniture, rugs, curtains, baked goods and candies, and that the taking of orders for and the delivery of goods sold in the manner set out in the complaint was a mere incident to the conduct of the retail store business.

He further set up that at the January, 1908, term of the circuit court for the county of Muskegon, the said Archibald Bryant was acquitted of a similar charge upon a similar state of facts except that the time during which it was charged he violated the ordinance was a time preceding instead of subsequent to the 5th day of July, 1907; the court directing a verdict in favor of said Bryant upon the ground that he was not a hawker or peddler in fact or within the meaning of said ordinance. Respondent also asserts that if the ordinance requires the said Bryant to obtain a license as a hawker and peddler, it is invalid because in conflict with, and in violation of, section 32, article 6, of the Constitution of this State, and in conflict with, and in violation of, section 1 of the 14th Amendment of the Constitution of the United States.

OSTRANDER, J. (*after stating the facts*). I do not find in the record support for the claim that the warrant was refused and the case presented by collusion of the justice and the city attorney or that the person sought to

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be charged in the warrant which was applied for could, or would, if greater privileges had been extended to him, have presented in the return to the order to show cause any other or different reasons for refusing the warrant. There is precise precedent for the practice pursued, in *Chaddock* v. *Day*, 75 Mich. 527 (4 L. R. A. 809). Counsel seem to agree that the question is presented whether Archibald Bryant is a hawker and peddler within the meaning of the ordinance. It is averred in the answer to the order to show cause, and must be assumed to be true, that the conduct complained about was incident to the general retail business carried on by Bryant at his store.

The charter of the city empowers the common council to enact ordinances, etc.,—

"To license hucksters, peddlers * * * in the business of hawking and peddling, and to regulate and license the sale by peddling (directly or by canvassing for subscription) of goods, wares, merchandise, refreshments or any kind of property or thing, by persons going about from place to place in the city for that purpose, or from any stand, cart, vehicle or other device in the streets, * * * open places or spaces, stores, offices and business blocks and places, public grounds or buildings in said city." Act No. 469, Local Acts 1895, tit. 7, § 24, subd. 8.

The popular meaning of the words hawker and peddler and, perhaps, the meaning indicated by the derivation of the words, involves ideas both of the carrying of goods for sale and of an itinerant vender. Expressions of this conception of the meaning of the words are found in legislation and in judicial utterance. See 2 Rawle's Bouvier, p. 642; *Com.* v. *Ober*, 12 Cush. (Mass.) 493; *Village of Stamford* v. *Fisher*, 140 N. Y. 187; *Emmons* v. *City of Lewiston*, 132 Ill. 380 (8 L. R. A. 328); *Rex* v. *McKnight*, 10 B. & C. 734; *State* v. *Hogdon*, 41 Vt. 139; *City of Chicago* v. *Bartee*, 100 Ill. 57; *People* v. *Baker*, 115 Mich. 199.

Our own statute, after describing those who must obtain a license (2 Comp. Laws, section 5324) excepts certain persons whose acts may bring them within the class

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(section 5330), and the excepted class has been recently enlarged (Act No. 120, Public Acts 1905; Act No. 225, Public Acts 1907). Whatever meaning may have been given to the words, anciently or in later times, it will be observed that the charter powers above recited extend to licensing and regulating the sale of any kind of property by persons going about from place to place in the city for that purpose. It may be admitted that the common council of Muskegon has not the power to prescribe new definitions for terms which already have legal definitions. It has not attempted to do so. It has, for the purpose of the exercise of a power to regulate sales made from house to house, provided (section 6):

"Any person or persons who shall go about from house to house or place to place and sell or offer to sell any article of trade or commerce to be delivered then or in the future shall be deemed to be a hawker and peddler within the meaning of this ordinance," which is entitled, generally, as is above stated.

It is inaccurate, therefore, to say that the case turns upon the question of who is a huckster, or hawker, or peddler, as the words have been judicially defined, and decisions which rest upon a judicial construction of statutes or of ordinances in which the words are employed without qualification are not necessarily controlling or helpful.

The particular ordinance has been considered by this court in two cases,—*City of Muskegon* v. *Zeeryp*, 134 Mich. 181; *City of Muskegon* v. *Hanes*, 149 Mich. 460, —in the first of which it was held that the charter powers were sufficient to sustain this section of the ordinance and in both that it was violated by acts similar in character to those stated in the complaint in this case. See, also, *City of Alma* v. *Clow*, 146 Mich. 443. If these cases are not decisive of the case at bar, it is because the person who is here sought to be charged with a violation of the ordinance is a local, retail merchant, who keeps a store and who also does what the ordinance, in terms, prohibits. If section 6 of the ordinance does not apply to resident

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storekeepers, it is invalid upon the authority of *City of Saginaw* v. *Saginaw Circuit Judge*, 106 Mich. 32; *Brooks* v. *Mangan*, 86 Mich. 576. See *James* v. *Sweet*, 125 Mich. 132, 137; *Chaddock* v. *Day*, 75 Mich. 527 (4 L. R. A. 809). In terms it applies to residents and nonresidents alike, to storekeepers and those not storekeepers. The right of the city to exercise the power with respect to others than resident merchants is not denied. It is not claimed that the fee exacted is unreasonable. The constitutional questions raised by the return to the order to show cause are not argued in the brief. To sustain the order of the court below, we must read into the section the words, or their equivalent in meaning, "except resident merchants who have an established place of business." Aside from rendering the section invalid, such an interpolation of words would be, in my opinion, bald judicial legislation.

The determination of the court below is reversed, with direction to grant the writ of mandamus. No costs are awarded.

HOOKER, MOORE, CARPENTER, and MCALVAY, JJ., concurred.

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GORDON v. TOWNSHIP OF BURLEIGH.

EXECUTION—BILL IN AID—EQUITABLE INTEREST—WHAT CONSTITUTES—QUIETING TITLE—PROPRIETY OF REMEDY.

Where, prior to the levy of an execution on certain lands as the property of complainant, he had conveyed the same by quitclaim deed, taking a mortgage for a part of the purchase money, which deed was, but the mortgage was not, recorded at the time of the levy, complainant's interest in the land was an equitable one, within the meaning of section 9167, 8 Comp. Laws, and the failure of the execution creditor to take proceedings to determine complainant's interest within one year, as provided by the statute, rendered the levy and sale ineffective; and complainant having subsequently taken possession under his mortgage, the levy and sale constituted a cloud upon his title which he was entitled to have removed upon a bill filed for that purpose.

Appeal from Iosco; Connine, J. Submitted June 8, 1908. (Docket No. 40.) Decided July 1, 1908.

Bill by Charles F. Gordon against the township of Burleigh to remove a cloud from title to certain land. From a decree for complainant, defendant appeals. Affirmed.

Albert W. Black, for complainant.

Jahraus & Rawden, for defendant.

Complainant filed his bill in this case to remove a cloud from the title to his land, consisting of a levy under execution, a sale of the land and sheriff's deed to the defendant township. The facts are conceded, and, briefly stated, are as follows:

Complainant acquired title in 1878. In 1882 he gave two mortgages upon it which were afterwards discharged. On July 2, 1883, he conveyed said land by quitclaim deed to one Frank Pierce, the consideration named therein being $1,500. The deed was recorded January 30, 1884. On the date of the deed Pierce executed to the complainant a mortgage for $1,200, the balance of the purchase price. This mortgage was recorded in February, 1892.

July 5, 1883, defendant township commenced suit in attachment against complainant, attaching the land here in controversy, obtained a judgment and took out an ex-

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ecution and levied upon the property March 7, 1884. The defendant purchased the land at the sale and obtained a deed August 10, 1885. On February 20, 1892, complainant assigned to his wife the mortgage given by Pierce. She is now the holder of the same. Complainant has been in almost continuous possession of the land since 1878. The court made a finding and found, in addition to the above facts, that Gordon took possession of the land in 1886, apparently under his mortgage; that he has since occupied it, rebuilt the buildings, which were burned, and purchased tax titles which had meanwhile accumulated against the land. Defendant's answer alleges that the conveyance by complainant to Pierce was without consideration and made with intent to hinder, delay, and defraud defendant out of the collection of its claim. Defendant took no steps to obtain possession of this land except to institute a summary proceeding for that purpose, which was decided against it October 13, 1885.

The court entered a decree for the complainant.

GRANT, C. J. (*after stating the facts*). The sole question presented to the court is, Does section 9167, 3 Comp. Laws, apply, and under that statute was it the duty of the defendant to commence proceedings within one year after sale to determine complainant's interest in the land? The statute will be found quoted in full in *Daniel* v. *Palmer*, 124 Mich. 335.

It is insisted by counsel for the defendant that the levy was made upon a legal, and not an equitable, interest in the land, and that therefore the statute does not apply. Complainant had no legal title upon which a levy could be made. He had parted with it. He had taken a mortgage from his grantee, which gave him an equitable interest in the land. How could there be a levy upon the legal title of complainant, which had passed from him to another? If complainant had any interest, it must have been an equitable one under some arrangement with his grantee.

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We think the case comes within the statute, and that it was the duty of the defendant to file its bill in equity within one year after the sale to determine what interest, if any, the complainant had in the land. *Daniel* v. *Palmer*, 124 Mich. 335; *Kunze* v. *Soloman*, 126 Mich. 290; *Tiedemann* v. *Kroll*, 144 Mich. 308.

The purpose of this statute is well stated in *Daniel* v. *Palmer*, in which the circumstances are very closely allied to those in the case at bar.

Decree affirmed, with costs.

BLAIR, MOORE, CARPENTER, and MCALVAY, JJ., concurred.

CLEMENS v. GEM FIBRE PACKAGE CO.

1. MASTER AND SERVANT—PERSONAL INJURIES—DEFECTIVE MACHINERY—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.
   In an action by a servant for personal injuries, the testimony of plaintiff and his witnesses, if credited by the jury, established the fact that the stamping machine which plaintiff was operating at the time of the injury repeated and was defective, causing the injury. Defendant offered testimony tending to prove that it was mechanically impossible for the machine to repeat, and had the machine in operation before the jury and before this court. *Held*, that whether the machine was defective and repeated was a question for the jury.

2. SAME—DEFECTS IN MACHINERY—EVIDENCE—ADMISSIBILITY.
   Objections to the testimony of a witness as to the condition of a machine at the time he repaired it some two months after an accident, on the ground that he first saw the machine at the time he repaired it, were properly overruled where defendant claimed that no repairs had been made subsequent to the accident which affected the operation of the machine, introduced testimony tending to prove that the parts of the mechanism complained of were quite hard and not likely to wear seriously in two or three months, and had the machine

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in court and operated it before the jury, manifestly on the theory that its then condition was not materially different from that at the time of the accident.

8. EVIDENCE—EXPERTS—COMPETENCY.

Where the secretary-treasurer of defendant corporation and the superintendent of its factory testified that a certain person was employed to look after certain machines, the corporation cannot contend that that person is not qalified to testify as an expert regarding the condition and operation of the machines.

4. MASTER AND SERVANT — PERSONAL INJURIES — WARNING AND INSTRUCTING SERVANT — SUFFICIENCY OF WARNING — QUESTION FOR JURY.

Where, in an action by a servant for injuries received while operating a stamping machine, there is a conflict of testimony as to the character of the warnings and instructions given plaintiff at the time of setting him to work, and the instructions, if plaintiff's testimony is believed, were insufficient, the question is one of fact for the jury.

5. SAME—WARNINGS AND INSTRUCTIONS—NECESSITY.

Where plaintiff, an inexperienced servant, without knowledge as to the proper method of operating the stamping machine at which he was set to work, and which was alleged to have been defective, was instructed to operate it in the most dangerous way, and was hurt within a few minutes after he commenced the work, the question whether, in view of his inexperience, he was likely to appreciate the danger of following the instructions, was a question of fact for the jury; and if they determined he was not, then, regardless of the condition of the machine, the giving of instructions by the person charged with the duty of giving them to do the work in a dangerous way, when there was a safe way, was actionable negligence.

6. SAME—RISKS ASSUMED—INSUFFICIENT WARNINGS.

Where an inexperienced servant was set to operate a dangerous machine, his assumption of the ordinary risks thereof was dependent upon his being properly warned and instructed in its use.

7. SAME—DEFECTIVE MACHINERY.

Where an inexperienced servant was set to work upon a dangerous machine which was in a defective condition, he assumed only such risks as the jury find he knew of or ought to have known of and appreciated their dangerous character.

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8. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
Whether an inexperienced servant was guilty of contributory negligence in operating a dangerous machine in the manner in which he was instructed by the superintendent of the factory when set to work, is at most, from defendant's standpoint, a question for the jury.

9. DAMAGES—PERSONAL INJURIES—LOSS OF EARNING POWER.
Where plaintiff, suing for damages for a personal injury consisting of the loss of two fingers of his right hand, was 16 years old at the time of the injury, and was injured on the second day of his employment with defendant, the first he ever had, he had acquired no status as a wage earner, and it was not error to refuse an instruction that as a matter of law there was no evidence that plaintiff's injuries had "affected his ability to earn money."

10. SAME—INSTRUCTIONS—HARMLESS ERROR.
Where a boy of 16, suing for damages for a personal injury consisting of the loss of two fingers of the right hand, recovered a verdict of $1,500 under an instruction to award such an amount as would fairly compensate him for his injury, the amount awarded is not unreasonable aside from any loss of earning power; and if any error was committed in refusing an instruction not to include any damages for loss of earning power, such error was not prejudicial.

Error to Wayne; Hosmer, J. Submitted June 9, 1908. (Docket No. 26.) Decided July 1, 1908.

Case by George F. Clemens, by next friend, against the Gem Fibre Package Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Keena, Lightner & Oxtoby, for appellant.

George F. & Peter J. Monaghan, for appellee.

BLAIR, J. Plaintiff brought this action to recover damages for the loss of two fingers while operating a metal stamping press, designated in the record as a Rudolphi & Krummel press, No. 2, in forming tin boxes. He secured

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a verdict of $1,500, and defendant prosecutes this writ of error to review the judgment entered thereon.

At the time of his employment by defendant, plaintiff was 16 years old, and was the only witness of the accident. His testimony as to his employment, his work, and the accident, was as follows:

"I was first employed a day and a half before the accident. Tom Neal, the superintendent, employed me. He gave me work picking up paper off the floor, and sweeping the floor and putting it in boxes. I worked at this for one day. He then placed me in the dry room, dipping the tins. I dipped the tins into a sort of a black fluid or liquid and placed them in the oven. I worked at this about half a day. I then was engaged on a machine; the machine that caused the accident. The foreman found me in the dry room, when he got me to work on the machine. He called me and said: 'I have another position for you to fill—on a machine.' I told him I did not like to work on a machine; I did not know anything about it. And he said that he would show me how to run the machine. I did what he told me to do. I went with him to the machine; he took a piece of tin. First he told me to put my foot on the lever and have the stamp come down and to take it off and the stamp would go up and stay up; and put my foot on the lever again and have the stamp come down again; and he fed a piece of tin—fed about four or five, and about the fifth piece stuck in the machine, and he knocked it off with his finger. He told me to feed the machine and to do as he had done until he fetched me an instrument. I put in about four pieces of tin while he was there watching. After watching me do the work about two minutes, the foreman left me. He gave me no warning about the dangerous character of the machine, nor was anything said about any defects in the machine. I had never worked on any machine before. The accident happened about 10 minutes after the foreman left me.

"The accident happened in this manner: I was feeding them in the machine; feeding about four pieces and the fifth piece stuck in the machine. After I would stamp a piece of tin, I would always take my foot off the lever and put it back from the lever. After I stamped the fifth piece of tin and withdrew my foot away from the lever, knocked it off the die—it stuck—the punch came down on

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my hand and came down so fast that the belt flew off and it stuck right there and my fingers in the machine. * * *

"When I was put at work on the machine, I was not instructed as to the brake. I did not know where the brake was or what it was. I knew nothing about the various parts of the machine, nor had I been instructed about the clutch or the brake or how to cure defects in them.

"On the day that I was injured, I was first put to work on another machine by Mr. Neal. That was a punching machine to stamp out the covers for the butter crocks. After working on that machine for a short time, I told Mr. Neal that I did not want to work on the machine; that it jumped. Then he took me off that machine and put me on this one. * * *

"I knew if I put my fingers in that machine and put my foot on the lever it would crush them. * * *

"*Q.* Now, you say that after you had worked on the paper machine for about half an hour then you stopped, did you?

"*A.* I stopped.

"*Q.* And what did you do?

"*A.* I told Mr. Neal I did not want to work on the machine.

"*Q.* And where was Mr. Neal at that time?

"*A.* He came around to see—he came around—I got off the machine and I went and found Mr. Neal and told him I did not want to work on the machine, that it was not in good order. The plunger came down about six times without putting my foot on the lever.

"*Q.* You told Mr. Neal all that?

"*A.* Yes, sir.

"*Q.* Now tell me the time you got hurt on this machine; do I understand that the die came down without your having your foot around the treadle?

"*A.* On which machine—on that machine?

"*Q.* Yes.

"*A.* The die came down without my foot on the lever.

"*Q.* And the die came down. I think you were telling us that you got a piece of tin, or whatever they were, and one of the pieces of tin had rested on the die and you struck it off?

"*A.* I knocked it off with my fingers.

"*Q.* Knocked it off with your fingers?

"*A.* And just as I was under knocking it down the

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plunger came down. * * * It had gone right up and came right down again without my foot on the lever—came down unexpectedly I will tell you. * * *

"*Q.* And you took your fingers to get it off?

"*A.* I took my fingers to knock it off just as Mr. Neal done when he was running the machine."

Defendant's superintendent, Neal, who had charge of the presses when plaintiff was hurt, testified:

"I recollect plaintiff coming for work, and of his being placed upon a paper stamping machine. That was the day before he was injured. I took him to Charles Dewstow and he instructed him as to running the machine. He worked nearly a day on the paper press—I would not be sure, but he worked a great part of the day before he was injured. He was transferred onto the tin press because work enough had been done on the paper press to last us awhile and he was taken off that work. If I remember right, he was taken off the paper press and put in the lacquer room by myself and from there to the tin room. Mr. Clemens at no time, while he was working on the paper press or later, complained to me about the paper press jumping, or his not wanting to work on it because of danger. I never heard of that before. I put plaintiff to work on this particular press I would say it was less than half an hour before he was injured. The operation of the paper press and of this press is similar. They both work by treadle. I took plaintiff over to the press and started to operate it and I was very particular to tell him to be sure and take his foot off the pedal while feeding it, and I ran it a little while and showed him just how to do it, and then he went to work at it and I stood and watched him. I watched him until I felt that he understood it and then I left. I think I operated it myself anyway 5 minutes and I suppose that I stayed there for 5 or 10 minutes while he operated it. I struck off probably 50 can tops there. The press worked all right; it worked perfectly. It did not repeat at all during that time. If the press at that time had shown any weakness or defect in its operation or otherwise, I would have stopped the machine and examined it and looked at the defective part. It would be my duty to attend to the press, if there were any such thing the matter. The press is geared up to run about 125 strokes a minute. * * *

"If a piece of tin had stayed on the die and the opera-

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tor had wanted to get it off, there were plenty of tins around there that could be used to get it off with. I told plaintiff to do it in that way. I told him to take it off with the tins. I did not say anything about providing him with anything else. It would be just as easy to take it off with the tins as with the fingers."

The Rudolphi & Krummel press works as follows: By pressure upon the foot treadle, the clutch fork is pulled down, allowing the clutch pin to be thrown by a spring so that the pin engages the wheel which carries the power. The wheel is constantly revolving while the engine is going and the belt is on the pulley. When, by pressing on the foot treadle, the clutch pin is made to engage with the wheel, the shaft revolves, and by eccentric action, the stamp or plunger is forced down, the dies meet and perform their work and the stamp or plunger is brought up to its former position. This action necessarily occurs with each revolution of the shaft. If the foot treadle is held down, this action continues. Upon removal of pressure from the foot treadle, the clutch pin releases the wheel and the shaft carrying the stamp or plunger stops after the first revolution. A friction brake applied to the shaft by a small hand wheel regulates to some extent the action of the shaft. On the Rudolphi & Krummel press, a safety pin is provided which is designed to prevent the machine, even when the friction brake is entirely removed from contact with the shaft, from revolving more than once unless the foot treadle is kept down.

Defendant's counsel distribute their argument under five principal heads. We shall consider the points made somewhat out of their order as presented by the brief.

2. The record does not show that plaintiff's injuries were due to any negligence on the part of the defendant. As stated by defendant's counsel:

"The circuit judge submitted the question of defendant's negligence to the jury, upon two items:

"*First.* Whether the defendant failed to give plaintiff proper instruction, and,

"*Second.* Whether the press was defective. The other

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allegations of negligence were not proven, or, at all events, the circuit judge so decided.

"The defendant's claim on this branch of the case is:

"(*a*) That there was no proper evidence submitted on the trial tending to prove any defect in the press.

"(*b*) That plaintiff had sufficient warning and knowledge of the danger connected with using the press, and that therefore defendant was not negligent in this respect; and finally

"(*c*) That the court erred in not eliminating from the consideration of the jury the other alleged grounds of negligence, which were set forth in the declaration, but were not proven."

The witness Jolly testified that prior to the plaintiff's injury:

"I told Tom Neal, the foreman, that the brake worked loose, and he told me to tighten it up. I don't know exactly how many times I told him, but I think it was more than once. I have tightened the brake myself without notifying him. * * *

"*Q.* Now, did it, while working with you, remain up when you took your foot from the lever?

"*A.* Well, it came down a couple of times when I was not expecting it; but then I did not pay any attention to it. * * * The only thing that I told Mr. Neal was that the brake was loose; sometimes he would come over and tighten it, or he told me to tighten it, and it was all right after I tightened it. * * * An experienced man could tell of the looseness of the brake by the sound of the press. A new hand would not be able to tell.

Samuel Keys testified:

"I noticed that the brake occasionally worked loose.

"*Q.* And what was the effect upon the machine when the brake worked loose?

"*A.* Well, put your foot upon the lever and it would come loose, and if the brake was very loose, it would go up and trip and come right over and come down again; repeat. * * * If the brake was very loose, when you put your foot on the lever it would come down and would go up again and trip and come right over and down again; that is, repeat. When this would occur, the person who is at work on the press generally fixed it if they were experienced enough to know. Sometimes I did it if I no-

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ticed it; sometimes Mr. Neal would do it. He generally saw it himself when I first started on the press, but after I got used to it, if I noticed it myself, why, I tightened it up. * * * I ran the machine the evening after the plaintiff was injured and it tripped perfectly; I told Mr. Harbeck that, and that is the truth.

"*Q.* And you told him the machine was not changed or fixed between the time of the accident and when I was working on it after supper, did you tell him that?

"*A.* To my best knowledge.

"*Q.* To your best knowledge, you told him—you were telling him your best knowledge?

"*A.* Yes, sir. * * * I saw this machine repeat when I was on the machine. It repeated with me after I was an experienced hand. So far as I was concerned, there was no warning given by the machine before it repeated. I cannot say how many times or how long before the accident it repeated. I have seen the machine come down several times with others and when it repeated for me, I had my foot off the lever."

Edward Mohr testified that he lost two fingers on this same machine a week or two before plaintiff's injury:

"I was hurt by the brake being loose and the machine repeating. All the time the machine repeated, I did not have my foot on the lever. * * * I put a piece of tin under the die and bumped it and it went up, and when I went to put another piece, when I was putting the other piece on, the die came down on my fingers and a piece was under my fingers yet. I had not put my foot on the lever to make it come down the second time. I put my foot on the lever and it came down, and just as I was putting a piece of tin in the die, it came down again without my putting my foot upon the lever."

Mr. Neal testified for defendant:

"I heard the testimony of Mr. Jolly. He told me once that the press repeated. I examined the machine and tried it and could not—I never saw it repeat. Mr. Jolly was working on the machine at the time and he came to me, as foreman, and told me the machine repeated and I went over and tried it and found that it did not repeat. * * *

"*Q.* In testing this machine, or operating this machine

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after Mr. Jolly reported to you that it wouldn't work right and that it repeated, what did you do?

"*A.* Tripped the machine. * * *

"*Q.* Just put your foot on the lever and kept on doing that a few times to see whether it repeated or not with you?

"*A.* Yes, sir.

"*Q.* That is all you did?

"*A.* Yes, sir."

Hugo Gressman testified for plaintiff:

"I am experienced in machinery for stamping sheet metal and have been engaged in that kind of work off and on for 12 or 13 years. I began working for the Gem Fibre Package Company, the defendant, I think it was in August, 1904. I was hired to set dies and take care of presses. The press in court came under my line of work. I found defects in that machine which I repaired.

"*Q.* Tell what those defects were which you repaired a year ago last August?

"*A.* I came into the factory and the first thing I did I looked over the machines; I looked at them and tried them and I saw that some of the parts were worn. And I tried the slides first. I found the slides worn slightly and loose. * * * The first thing I did was to adjust the slides, and it ran along, I think, for a day or two and there was something defective in the clutch—I noticed that. * * * I took the wheel off and examined it and I found the edges of the pin were worn off round.

"*Q.* Did you repair that?

"*A.* Yes, sir.

"*Q.* Did you see if the brake was properly tightened?

"*A.* Well, I found out in a day or two that it worked loose. I did not know it at the time, just the same day I started to work, I didn't find that out; I found out little by little. I had never seen a machine of that manufacture before until I came to work for them. * * * I am not exactly a machinist. * * * My chief work was changing the dies and getting the machine ready for work. I had done that work in other shops. After I became employed there, I had this machine apart several times. I had the pin out. I ground off the face of it to square it, so that it did not have so much chance to slip out. * * * I did not put in a new pin. So far as I know, the same pin is now in the machine that has always been there; I

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ground the pin off which would make the edges a little sharper. That would make the pin remain there more certainly when it became engaged. If the pin came out, the machine would stop. If the pin did not engage, the machine would not work. If the clutch lets go entirely, it can't repeat, but if the clutch may remain half way in, it would cause it to. * * *

"*Q.* Is that the dog that shoves up there in front of the hole there; did you ever tinker with that dog?

"*A.* Yes, I think I did grind off that place in there and made a point on it, or put a point on it by grinding this beveled side.

"*Q.* How much did you grind?

"*A.* Oh, perhaps, well, not an eighth of an inch. * * *

"*Q.* Were the conditions which you found in the machine at the time of your repairing it, such as might cause this repetition that is complained of in this case?

"*A.* Yes, sir. * * *

"*Q.* Well, if the dog was worn away, then it would repeat eternally, wouldn't it?

"*A.* Not necessarily.

"*Q.* Why not?

"*A.* Because it would not always strike the same way. There might be a little defect in there that would not cause a continuous defect in the machine; it may work this time and the next time you put your foot on it may not work.

"*Q.* Now, is that the only thing that you repaired that would be likely to cause a repeating?

"*A.* Yes, sir."

Neal testified:

"I remember witness Gressman saying he ground the clutch pin on this machine which was all right; I think he did. That was about two months after the accident; * * * I have been in charge of the machines at the factory since this press was purchased and put in place, although the presses have not been directly under me of late. There is more work now and I have more help and at the present time other men look after the machines under my directions. Back of that time, I did it myself. Mr. Gressman was employed to relieve me of what I had done previously."

Mr. Harbeck, secretary and treasurer of defendant, testified:

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"I can't say whether Mr. Gressman repaired this particular machine. I presume that he did. That is what we had him for; but the nature of the repairs had nothing to do with the repeating of the press."

Defendant's testimony tended to show that the mechanical construction of the machine was such that it was impossible for it to repeat.

"On the Rudolphi & Krummel presses and on this particular press, there is an appliance which is designed to and which does prevent a repeating of the machine, whether the friction brake is on or not. It is a pin right above the fork. That pin is put on there in case the brake would be loose—slides loose or anything, and you have got a die in there, possibly with a big rubber where there is considerable rebound—if your brake is loose—slides loose that throws it around as quick as that pin was out, the rebound of the rubber bringing it up the slide would throw that over center, and if it does this, with this pin in there, this pin will strike the fork and that pin has either got to break or the fork has got to break to let it pass over, provided the thing is in shape, without there is something broke off of it before. That pin is on this machine, and in my experience it works in the way that I have described. I have never known it to fail."

a. The testimony of plaintiff and his witnesses, if credited by the jury, established the fact that the machine repeated and was defective, unless we must hold that the jury were bound to find that it was mechanically impossible for the machine to repeat, under the testimony, and that the witnesses to that effect either committed perjury or were certainly mistaken as to the fact. Notwithstanding the persuasive argument of the able counsel for defendant, illustrated by the operation of the machine in question in our presence, we think it would have been improper for the trial judge and equally improper for us, upon the basis of our judgment as to mechanical possibilities, to invade the province of the jury and determine as a matter of law that there was no question of fact for their consideration. *Dupuis* v. *Traction Co.*, 146 Mich. 151.

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By assignments of error 1st, 16th and 17th, defendant's counsel sought to have the court exclude from the jury as bearing upon the question of defendant's negligence, any testimony of Gressman, *first*, because he never saw the machine until some two months after the accident; and, *second*, because he was not an expert. Prior to the testimony of Gressman, the following colloquy occurred between counsel:

"*Mr. Monaghan:* Is it your contention that this machine was not repaired from the time that that accident happened up to the present time?

"*Mr. Lightner:* My contention is that if there were any changes of any kind, they were not with regard to the operating of the machine.

"*Mr. Monaghan:* Were not regarding any part which concerned the operation?

"*Mr. Lightner:* Which affects the operation of the machine.

"*Mr. Monaghan:* Either the clutch or the dog or anything else?

"*Mr. Lightner:* Yes."

There was no evidence of any repairs made after the accident by anyone but Gressman, and defendant had the machine in court and had it operated in the presence of the jury, manifestly on the theory that its then condition was not materially different from that at the time of the accident. The testimony of defendant's expert, Wood, indicated that the parts of the clutch mechanism were quite hard and not likely to wear seriously in two or three months. Under such circumstances and the concession of counsel, the court did not err in admitting the testimony of Gressman as to the condition of the mechanism. *Fuller* v. *Mayor, etc., of Jackson*, 92 Mich. 197.

The testimony of Mr. Harbeck and Mr. Neal, previously quoted, is a sufficient answer to the contention that Gressman was not qualified to testify as an expert.

b. Plaintiff's testimony, if believed by the jury, would warrant a finding not only that he was given no instructions about the brake or its liability to become loose and

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the necessity for tightening it; or as to the promptness with which he should remove his foot from the treadle; or as to the reports that the machine had repeated and the necessity for removing the work with a tin and not with his fingers; but that, on the contrary, he was instructed that when he took his foot off the treadle "the stamp would go up and stay up," and to remove the tins with his fingers, "just as Mr. Neal done when he was running the machine." There was a conflict of testimony as to the instructions given and the court did not err in submitting the question to the jury.

Under this subdivision of the brief for defendant, it is said:

"By the defendant's 9th request, it asked the court to advise the jury that if the press was all right, their verdict would have to be for the defendant; also, that if the press was all right, and had been properly inspected, a verdict should be rendered for defendant, even if, as a matter of fact, the machine did repeat.

"The court modified these and other requests, by adding that they would not apply if the plaintiff had not received sufficient instruction or warning, and the court emphasized the error which we are now considering, by instructing the jury that they were to consider whether the proximate cause of the injury was the failure to give plaintiff instruction; and again, whether the proximate cause of the accident was the failure of plaintiff to appreciate the danger incident to handling the machine."

In considering the propriety of the modifications of the instructions, the inexperience of the plaintiff and all of the surrounding circumstances must be borne in mind. The mere fact that he knew that if his hand was under the die when he put his foot upon the treadle it would be crushed was not sufficient to relieve the defendant. *Allen* v. *Jakel*, 115 Mich. 484.

There was a safe way of using the machine, which Neal testified he directed plaintiff to follow, and the following of which would have prevented any injury. Plaintiff testified that Neal knocked the tin off with his fingers and in-

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structed him to do the same way till he brought him an instrument. Plaintiff had worked for a short time on the paper machine and had been relieved at his own request because it repeated and was then put at work upon the machine in question, which Neal told him would not repeat if his foot was taken off the treadle. He knew nothing about the machine except the feeding of the tin and was instructed to feed the tin in the most dangerous way and was hurt within a few minutes after he commenced the work.

Whether, in view of plaintiff's inexperience, he was likely to appreciate the danger of following the instructions given him, was a question of fact for the jury, and if they determined that he was not, then, regardless of the condition of the machine, the giving of instructions by the person charged with the duty of giving them to do the work in a dangerous way when there was a safe way was actionable negligence. *Kolodziejski* v. *Seestadt*, 143 Mich. 38.

c. The other allegations of negligence were sufficiently eliminated by the charge of the court confining the jury to the consideration of the two submitted. We do not think there was any prejudicial error, if any at all, in refusing the request.

3. Assumed risk and errors in the record upon this proposition. The court instructed the jury upon this subject as follows:

"I am asked to charge you, if you find that the press machine was in good condition and that there were none of the defects in it as claimed by the plaintiff, your verdict will be for the defendant, because the plaintiff assumed the ordinary risk attendant on the ordinary operation of the machine. I think that is so, gentlemen of the jury, but at the same time I qualify it only, as I said before, by saying to you that, if he had not sufficient appreciation of the danger or sufficient instructions to warn him in that regard, why, under those circumstances, you may find that that was the proximate cause of the injury. But it presents, as I said before, wholly a question for the jury and not a question for the court."

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We think it clear that the court would not have been justified in directing a verdict for the defendant on the ground that if the machine was in proper condition plaintiff assumed all of the ordinary risks, since his assumption of the ordinary risks would depend upon the finding of the jury as to the instructions given to him. If the machine was not in proper condition, plaintiff would only assume such risks as the jury should find he knew of or ought to have known of and appreciated their dangerous character. Our previous discussion obviates any further consideration of this head.

4. Plaintiff was guilty of contributory negligence. The question of plaintiff's contributory negligence was, under the alleged instructions, at most, a question for the jury.

5. Error relating to measure of damages. The assignment under this head is based upon the refusal to give the defendant's 17th request to charge, as follows:

"17. If you consider the question of damages, you will not include in your verdict any amount for loss of earning power, because it does not appear that plaintiff's injuries have affected his ability to earn money."

We do not think that the judge erred in refusing to instruct the jury that as a matter of law the loss of two fingers of the right hand was no evidence that plaintiff's injuries had "affected his ability to earn money." The only testimony on the subject of damages, aside from that relating to the accident, was that of the plaintiff, who testified:

"After the accident, I was taken to the sanitarium and suffered great pain, which continued for about a month. I am troubled with pain in that hand at the present time, if I write too long, say half an hour, and on cold days the fingers feel numb. They have no feeling in them at all.

"The plaintiff showed the right hand to the jury, from which it appeared that the first and part of the second joint of the first and second fingers had been entirely cut off. * * *

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"I am in the tenth grade at the Western High School. I have been there two years, I guess. This accident happened during vacation, and I entered the high school the next fall."

So far as the record discloses, the employment by defendant was the only employment the boy had ever had. His business was attending school, to acquire an education preparatory to future employment; he had acquired no status as a wage earner; and the case is to be distinguished from cases where evidence can be given of actual earning capacity and its subsequent diminution. See *Black* v. *Railroad Co.*, 146 Mich. 568.

The defendant's 16th request to charge was as follows:

"If you consider the question of damages, you will award to plaintiff such an amount as will fairly compensate him for the injuries resulting from the accident."

The trial judge gave the substance of this request and nothing else upon the subject of damages. The jury were not instructed that they might consider the question of loss of earning power or that such loss was an element of the damages to be awarded, but simply to award to the plaintiff "such damages as he suffered by reason of the injury." The amount awarded by the jury is not an unreasonable compensation for plaintiff's injuries, aside from any loss of earning power; the instruction as to the damages recoverable was substantially as requested by defendant, and if the court erred in refusing the 17th request, we think such error was not prejudicial.

We are of the opinion that the case was fairly submitted to the jury and that the assignments of error are not well founded.

The judgment is affirmed.

GRANT, C. J., and MOORE, CARPENTER, and MCALVAY, JJ., concurred.

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MORSE *v.* RESSLER.

ASSUMPSIT — ACTION — ISSUES — SALES — CONTRACT — QUESTION FOR JURY.

Where, in an action on the common counts in assumpsit, to which the general issue is pleaded, plaintiff claims the right to recover on the count for money had and received on the theory that he paid $10 to defendant for $10 worth of steel, which defendant refuses to deliver or repay the money, and defendant denies his right to recover on the ground that plaintiff bought a larger quantity of steel, paying $10 on the purchase price, and that he is ready to deliver the steel on receipt of the balance due, the pleadings and evidence raise a question of fact for the jury.

Error to Ingham; Wiest, J. Submitted June 9, 1908. (Docket No. 51.) Decided July 1, 1908.

Assumpsit by Rufus R. Morse and Samuel H. Davis against George S. Ressler for money had and received. There was judgment for defendant, and plaintiffs bring error. Affirmed.

Morse & Davis, in pro. per.

John J. Zimmer, for appellee.

MOORE, J. This case was commenced in justice's court. The plaintiffs declared orally upon all the common counts in assumpsit. The defendant pleaded the general issue. The case was appealed to the circuit court where it was tried by a jury which returned a verdict in favor of defendant. The case is brought here by writ of error.

The contention of the plaintiffs is well stated in a motion they made after the testimony was all in, which is as follows:

"The plaintiffs moved to strike out all the evidence that was introduced on the part of defendant, and to direct a verdict for the plaintiffs * * * for the following reasons:

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"This is an action on the common counts in assumpsit for money had and received, and whether or not plaintiffs have broken their contract or whether or not the defendant has suffered damages is immaterial under the pleadings, for to the common counts is interposed the general issue alone. There is no notice of recoupment or set-off. There is no dispute that the money has been paid and that nothing has been received therefor. There is no evidence that the money paid was stipulated damages. The contract was not pleaded in this case."

The judge denied the motion and charged the jury in part as follows:

"Gentlemen of the jury: This is an action brought by the plaintiffs against the defendant to recover $10 they claim they paid to the defendant on the 8th day of October, 1906, for some steel, $10 worth of steel, and they claim that defendant has refused to give them $10 worth of steel, and therefore they are entitled to their money.

"The defendant claims that the plaintiffs ordered 500 pounds of steel at an agreed price, and that the $10 was paid upon such order, and that there is a balance due after crediting the plaintiffs with the $10; there is a balance due to him, and he stands ready at any time to deliver to the plaintiffs the 500 pounds of steel when they pay him what they agreed to pay him.

"So the issue in this case, gentlemen of the jury, is for you to determine what the contract in fact was between these parties. Was the contract for $10 worth of steel? If it was, then the plaintiffs have paid all they agreed to pay, and the defendant, by refusing to let them have the $10 worth of steel, must return their money. He has not returned it, and if you find that to be the contract, then the plaintiffs are entitled to recover their money, in this case $10.

"On the other hand, if that was not the contract, but the contract was for 500 pounds of steel, which was according to the defendant's claim, it would amount to $29.75, and the $10 was paid upon that account, and there is a balance due the defendant, then the defendant was not bound to deliver the steel until he had his money, unless the contract provided that it should be delivered and credit extended, but there is no such testimony."

The trial judge made a further and detailed charge

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but we have quoted enough to show the issues involved. We think the case was properly submitted to the jury. *Ketchum* v. *Evertson*, 13 Johns. (N. Y.) 359; *Webb & Kinne* v. *Steiner*, 113 Mo. App. 489; *Day* v. *Farley*, 100 Mo. App. 633.

The testimony of the parties was in sharp conflict. The jury evidently believed the evidence offered on the part of the defendant.

The judgment is affirmed.

GRANT, C. J., and BLAIR, CARPENTER, and MCALVAY, JJ., concurred.

In re VITALI.

1. CRIMINAL LAW—ILLEGAL SENTENCE—POWER TO RESENTENCE. Where the trial court has imposed an illegal sentence, it has the power to substitute for it a legal sentence, notwithstanding the illegal sentence has been partly executed.

2. HABEAS CORPUS—IRREGULAR SENTENCE—PROPRIETY OF REMEDY. When there is a valid conviction and an irregular sentence, which, under the law, may be corrected by a new sentence, habeas corpus will not be permitted to perform the office of a writ of error.

Habeas corpus proceedings by Andrea Vitali to obtain his release from imprisonment in the State prison at Jackson. Submitted June 9, 1908. (Calendar No. 22,898.) Prisoner remanded July 1, 1908.

Joseph T. Schiappacasse, for petitioner.

John E. Bird (*George S. Law*, of counsel), for respondent warden.

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MOORE, J. The petitioner was convicted of murder in the second degree. He was sentenced to the Michigan State prison at Jackson for life and is now serving sentence. It is his claim that he is entitled to be discharged because section 3 of Act No. 184 of the Public Acts of 1905, known as the indeterminate sentence law, repeals that part of the statute allowing a sentence for life as punishment for the crime of murder in the second degree. No claim is made that the proceedings leading up to and including the conviction were not proper, but it is said that the sentence does not comply with the provisions of the indeterminate sentence law and is void and the prisoner should be discharged.

The case of *People* v. *Farrell*, 146 Mich. 264, is authority for the proposition that where the trial court has imposed an illegal sentence it has the power to substitute for it a legal sentence notwithstanding the illegal sentence has been partly executed.

In re Butler, 138 Mich. 453, and the cases there cited, sustain the rule that when there is a valid conviction and an irregular sentence which may, under the law, be corrected by a new sentence, habeas corpus will not be permitted to perform the function of a writ of error. It follows logically that the prayer of the petitioner cannot prevail.

His petition is denied and he is remanded to the custody of the respondent.

GRANT, C. J., and BLAIR, CARPENTER, and MCALVAY, JJ., concurred.

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MARTIN *v.* THISON'S ESTATE.

EXECUTORS AND ADMINISTRATORS — ESTATES OF DECEDENTS — CLAIMS—ALLOWANCE—ALIMONY.

An award of alimony is a valid claim against the estate of claimant's divorced husband, deceased, for the time elapsing between the date of the decree and the subsequent remarriage of claimant, where decedent in his lifetime took no steps for a modification of the award.

Error to Wayne; Donovan, J. Submitted June 9, 1908. (Docket No. 50.) Decided July 1, 1908.

Maggie Martin presented a claim against the estate of John Thison, deceased, for an amount due under an award of alimony. The claim was disallowed by the commissioners, and claimant appealed to the circuit court. There was judgment for claimant on a verdict directed by the court, and defendant brings error. Affirmed.

Walter Barlow, for appellant.

Julius J. Thiede and *Ari E. Woodruff* (*Frank W. Atkinson*, of counsel), for appellee.

MOORE, J. In September, 1887, the claimant married John Thison, now deceased. On March 10, 1897, she filed her bill of complaint against him in the Wayne circuit court, in chancery, for divorce. He was duly served with process. A decree of divorce was granted the claimant, and she was awarded permanent alimony in said cause to the amount of $1,200, to be paid to her in installments of $15 a week. The decree was filed August 6, 1897.

The claimant married Mr. Martin, December 20, 1897. After this Mr. Thison made two payments to her of $50 each to apply on the decree for alimony. At the time

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the decree of divorce was granted her, Mr. Thison owned no real estate, but had in the neighborhood of $900 in the bank. He was a saloon keeper. John Thison died intestate on January 25, 1906, leaving Peter Thison, his father, and Theresa Thison, his mother, as his only heirs at law. Administration of his estate was granted March 21, 1906, and commissioners on claims appointed therein.

The claimant filed a claim against the estate for $1,668.40 as the amount due her on said decree. The commissioners on claims disallowed the claim in full and an appeal was taken to the circuit court. At the conclusion of the testimony, the court directed the jury to return a verdict in her favor for $390.91, the amount claimed to be due from the date of the decree of divorce to the date of her marriage to her present husband. The case is brought here by writ of error.

The question involved in the case, as stated by counsel, is, Has a court at law jurisdiction to determine questions arising over the nonpayment of alimony granted a wife by a court of chancery in a divorce case? We quote from the brief:

"Our statute, 3 Comp. Laws, § 8641, provides:

"'After a decree for alimony or other allowance for the wife * * * the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance and the payment thereof, * * * and may make any decree respecting any of the said matters which such court might have made in the original suit.'

"This statute confers exclusive jurisdiction on the court of chancery, granting a decree for alimony to a wife in a divorce case, to conserve the interests of the parties, by exercising its power to alter and revise at any time a decree for alimony granted for her support.

"The statute takes away from a decree for alimony the element of a fixed judgment for money—a debt—such as will sustain an action at law, or separate suit to recover the amount claimed to be due upon such decree. The amount claimed to be due on a decree for alimony must be enforced or modified on the petition of either of the parties filed in the original suit wherein the decree for

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alimony was granted. The original suit on the question of alimony is always pending and subject to an application on the petition of either of the parties to alter, revise and even vacate the decree upon a sufficient showing being made for that purpose. No other court has any jurisdiction over the matter of the collection of the amount due on such decree for alimony, nor over the modification or revision of it. This question is well settled in this State. *Nixon* v. *Wright*, 146 Mich. 231." And also citing other cases to be found in the brief.

A reference to the cases will show them to be distinguishable from the case at bar.

The case of *Nixon* v. *Wright*, supra, was commenced as an action at law in the circuit court during the lifetime of the husband who might at any time have moved the court for a modification of the decree. In the case at bar the claim was presented to the probate court after the death of the husband, who during his lifetime did not seek a modification of the decree. Counsel has not called our attention to, and we have been unable to find, a case on all fours with the one before us. At the end of a chapter, in relation to procedure in alimony, it is said:

"The practice of the courts in awarding, securing and enforcing the payment of alimony differs in our States as respects mere form, but in substance it is the same in all. The needful facts must be set out in pleadings, they must be proved, and due steps must accompany the rendition of the decree. The processes for enforcing it are not quite identical in our States, and commonly there is a considerable election among them. In most of the States there is the attachment for contempt. In some, there may be an execution. Quite widely a suit will lie on the decree regarded as a judgment; sometimes there may be scire facias; sometimes a bill in equity." 2 Bishop on Marriage, Divorce and Separation, § 1114.

In *O'Hagan* v. *O'Hagan's Executor*, 4 Iowa, 509, the wife was granted a decree for alimony. Later she filed a bill asking for a modification of the decree so as to allow her a larger sum as alimony. While this bill was pending the husband died and his executor was made a party.

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The court stated that the only question involved was whether the death of the husband abated the proceedings, and, in deciding that it did, the court used the following language:

"But it is said that a decree may be made giving to the wife an annual or other allowance during her life, which may extend, and be enforced against his estate beyond the life of the husband; and if so, a court may also modify a former decree, either in favor of or against the husband, after his death. The answer to this is, that in such a case, the court has acted upon the whole question, during their joint lives, and has decreed to her a definite and fixed sum. This decree has the same force and validity as any other judgment, and may be collected in the same manner. It is a fixed, ascertained, and subsisting debt against him, and, upon his death, against his estate. Not so, however, with a claim for alimony which never has been settled; or where the wife after his death, seeks to increase the amount allowed in his lifetime. It is not a demand, definite in its character, to which she has an absolute right. By the decree giving her an absolute sum during her life, she stands as any other creditor, and her right to payment does not depend upon the amount of his estate, whereas the ability of the husband, and their condition in life, are important to be considered in awarding alimony, or in changing a dower for the same. The case of *Gaines* v. *Gaines*, 9 B. Mon. (Ky.) 295, expressly decides that the claim to alimony, as such, ceases at the death of the husband, and the petition of the wife therefor, was refused, though pending at his decease —the court saying: 'We are of opinion that such claim, though asserted before his death, will cease by that event, and cannot be afterwards availably asserted, unless it has been before ascertained and fixed by decree.' And to the same effect, see Bishop on Marriage and Divorce, § 559."

See, also, *Ulman* v. *Ulman*, 147 Mich. 353, and the cases cited therein.

In *Knapp* v. *Knapp*, 134 Mass. 363, it was held that the writ of scire facias was an appropriate process to obtain execution against the estate in the hands of an executor for arrears of alimony awarded against the testator in his lifetime.

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Section 9367, 3 Comp. Laws, reads in part as follows:

"When letters testamentary or of administration shall be granted by the judge of any court of probate, such judge may, in his discretion, appoint two or more suitable persons to be commissioners, to receive, examine and adjust all claims and demands of all persons against the deceased except in the following cases."

The exceptions do not affect the question at issue here. It will be observed that the statute refers to "all claims and demands of all persons against the deceased." We think it very clear that the decree obtained by the claimant constituted a claim or demand against the deceased. As the defendant did not seek to have it modified in his lifetime, and as no showing was made why the installments which had accrued between the date of the decree and the marriage of the claimant should not be paid in full, we think the judge did not err in directing a verdict for the amount.

Judgment is affirmed.

GRANT, C. J., and BLAIR, CARPENTER, and MCALVAY, JJ., concurred.

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REED v. LOUDEN.

TRIAL—MISCONDUCT OF COUNSEL—INTEMPERATE ARGUMENT.

In an action for breach of promise to marry, statements by plaintiff's counsel, in argument, wholly unsupported by the record, amounting to insinuations that defendant had used money to induce his witnesses to testify in his behalf, and that improper methods had been taken by a detective, are so prejudicial as to necessitate a reversal of the judgment.

Error to Saginaw; Gage (Chauncey H.), J. Submitted June 11, 1908. (Docket No. 68.) Decided July 1, 1908.

Assumpsit by Florence A. Reed against Frederick Louden for breach of promise of marriage. There was judgment for plaintiff, and defendant brings error. Reversed.

Beach, O'Keefe & Rockwith, for appellant.

Harris & Kendrick (*R. L. Crane*, of counsel), for appellee.

This is an action to recover damages for breach of promise of marriage. The engagement and preparation for the wedding were admitted. The day was set for the wedding. Three days previous, for some reason, the engagement was broken off. According to plaintiff's statement, defendant broke the engagement without any excuse valid in the law. Under his statement, she insisted on certain conditions which would justify him in breaking the engagement. He also testified that when she insisted upon the conditions the engagement was mutually canceled. There is no evidence or claim that defendant ever treated plaintiff in any other than a proper and considerate manner except by breaking the engagement. Plaintiff recovered verdict and judgment.

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GRANT, C. J. (*after stating the facts*). In the course of his concluding argument to the jury, counsel for plaintiff used the following language:

"Who is to blame? There he is,—a man who did to that girl worse than to rob her of her virtue. * * * This defendant did admit the promise to marry. Why? It would be easier then to satisfy the jury that the promise was broken off. * * * He broke off the engagement, and he can't give any reason for it to these twelve men. * * * I say this girl is abused and ill-treated by Louden in the way that no man who was a man would treat a girl. Oh, how small he has been in this trial. * * * The time to shoot men down and use violence is past and gone, and we are glad of it; and we come to you. Some of you have daughters; perhaps some have not; but I say to you that defendant wronged a poor, helpless girl."

Referring to some of the defendant's witnesses, plaintiff's counsel said:

"Well, there they are. Put them down there. Gentlemen, this is all they amount to. There is one thing I will tell you, gentlemen, money sometimes makes a man remember. Detectives sometimes do things that they ought not to do. Was it done here? I leave it to you. How these men appeared here. It is the most damnable piece of evidence I have ever seen in this court, and I believe that you ever did."

We think the record in this case does not justify the use of this extravagant language, intended to inflame the prejudices of the jury. A jury is perhaps naturally prejudiced against a man who breaks an engagement to marry. He is, however, entitled to the fair and unprejudiced judgment of a jury and to an assessment of damages which is not increased by unjustifiable and extravagant language on the part of an attorney. Here was a covert insinuation that the defendant had used money to induce his witnesses to testify in his behalf, and that improper methods had been taken by a detective. There was no evidence upon this record to justify the charge. This statement was evidently more damaging than was

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the statement made by counsel in *Selby* v. *Railway*, 122 Mich. 311, wherein counsel said:

"I do not want you to go to the jury-room to cut down, on the ground there will be a settlement in this case; they will go to the Supreme Court; they always go there."

We held that this was an ingenious invitation to the jury to increase damages. So, in this case the language was an ingenious invitation to the jury to believe that the defendant had suborned his witnesses. The above language and other similar to it is so intemperate that we find it impossible to say that it was not prejudicial. For this reason the judgment must be reversed, and a new trial ordered.

There are other assignments of error, but as the questions involved are not likely to arise upon a new trial, it is unnecessary to determine them.

HOOKER, MOORE, CARPENTER, and MCALVAY, JJ., concurred.

WISNIEWSKI v. NAWROCKI.

MECHANICS' LIENS—FORECLOSURE—COSTS—SOLICITOR'S FEE.

Though sections 10721, 10730, and 10736, 3 Comp. Laws, confide the question of costs and solicitors' fees in mechanics' lien cases to the discretion of the court, the complainant in a bill to enforce a lien, on establishing his right to a decree, should be allowed his actual disbursements and a reasonable amount for his solicitor.

Appeal from Wayne; Mandell, J. Submitted June 12, 1908. (Docket No. 19.) Decided July 1, 1908.

Bill by Frank Wisniewski against Anna Nawrocki to

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enforce a mechanics' lien. From a decree for complainant awarding an insufficient allowance for costs, he appeals. Modified.

William Van Dyke, for complainant.

MOORE, J. The complainant is a carpenter and filed a bill in chancery to enforce a lien for work done by him upon a building erected by defendant. After establishing his lien, his solicitor showed to the court the following items of costs incurred in establishing it:

Lien fee	$0 75
Lis pendens	75
Entry fee	5 00
Witness fees	8 80
Stenographer	4 00
Decree	7 00
	$20 80

A decree was rendered for the amount of complainant's lien but allowing him, against his protest, but $5 as costs.

The case is brought here by appeal. It is the claim of complainant that he should have been allowed his actual disbursements and a reasonable solicitor's fee. Sections 10721, 10730, and 10736, 3 Comp. Laws, contain provisions which apply to this proceeding. The complainant was compelled to resort to the court to obtain his relief. He established his right to a decree. We think he should have been allowed his actual disbursements and a reasonable amount for his solicitor, which amount, in view of the small amount involved here and the comparatively small amount of work required of the solicitor, we fix at the sum of $40 for both courts.

A decree may be prepared in accordance with this opinion.

GRANT, C. J., and BLAIR, CARPENTER, and MCALVAY, JJ., concurred.

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ATTORNEY GENERAL, *ex rel.* HUDSON, *v.* CITY OF DETROIT.

MUNICIPAL CORPORATIONS — POWERS — ORDINANCES — DETROIT CHARTER—CONTRACTS—HOURS OF LABOR.

Under section 241 of the charter of Detroit (Compilation of 1904), requiring all contracts involving an expenditure of more than $200 to be let to the lowest responsible bidder, the common council has, in the absence of express delegation of power by the legislature, no authority to limit by ordinance the hours of labor of employés of city contractors or subcontractors where the effect is to increase the bids for city contract work.[1]

Appeal from Wayne; Mandell, Hosmer, Murphy, Rohnert, and Donovan, JJ. Submitted June 15, 1908. (Docket No. 101.) Decided July 1, 1908.

Bill by John E. Bird, attorney general, on the relation of Joseph L. Hudson and others, against the city of Detroit to restrain the enforcement of an ordinance. From a decree for complainant, defendant appeals. Affirmed.

Sherman D. Callender, for complainant.

Timothy E. Tarsney, for defendant.

MONTGOMERY, J. This is a bill filed by the attorney general, on relation of certain taxpayers of the city of Detroit, praying an injunction to restrain the enforcement of an ordinance of that city, the first section of which reads as follows:

"SECTION 1. That hereafter eight hours shall constitute a day's work for all laborers, workmen, mechanics, steam engineers and engineers' assistants, who may be employed by or in behalf of the city of Detroit, or any of its authorized boards or officers, or who may be employed by contractors or subcontractors in work done or executed

[1] As to validity of limitation of hours of labor on public work, see note to *Keefe* v. *People* (Colo.), 8 L. R. A. (N. S.) 131.

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under contracts with the said city of Detroit, or its various authorized boards or officers."

It appears by the bill that two contracts were entered into by the city, one for the job printing for the year ending June 30, 1908, and the other for book binding for the same period. The city first advertised and received bids for the work with no reference to the ordinance in question. Under the first advertisement, the Houghton-Jacobson Printing Co. bid 46 per cent. off schedule price. Under the second advertisement, the bid was 25 per cent. off the schedule price for the same work. This latter bid was accepted by the city, although it made an increase in cost to the city for the job printing for the fiscal year of upwards of $3,000 over what the same company had offered to do the same work for under the first advertisement. As to the book binding, a similar discrepancy between the bids of those not agreeing to be bound by the terms of this ordinance and those who did is shown, the difference in the contract upon the different bases being $5,000.

Upon the hearing, the circuit court determined the case in favor of the complainant and enjoined the enforcement of the ordinance. The city appeals.

The solicitor for the city frankly states that he does not think the question involved comes within the rule which involves the exercise of the police power, for the reason that no element of safety or health is involved in the employment. The question may therefore be determined on narrow grounds. We are not called upon to disaffirm the power of the State to limit the number of hours of labor to be permitted by those engaged in public work, as to which question see *Atkin* v. *Kansas*, 191 U. S. 207. Nor are we called upon to determine whether the city may by ordinance prescribe the course of its own officers in employing laborers for the city, as to which see *Gadd* v. *City of Detroit*, 142 Mich. 683.

But the question is whether the State has delegated to

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the city the authority to fix the number of hours which a contractor for public work may require of his workmen, or whether, on the other hand, such a provision is inconsistent with the free competition which the charter of the city contemplates and requires among bidders for such work.

Section 241 of the city charter (compilation of 1904) provides as follows:

"No contract for the purchase of any real estate, or for the construction of any public building * * * or for any work to be done, or for purchasing or furnishing any material, printing or supplies for said corporation, if the purchase of said real estate, or the expense of such construction, repairs, work, printing, materials, or supplies shall exceed $200, shall be let or entered into except to and with the lowest responsible bidder with adequate security."

We agree entirely with the view expressed by the circuit judges that power has not been given to the common council to pass an ordinance like that in question so far as it relates to contract work, and that, in the absence of a grant of such power, the council has no authority to pass the ordinance in so far as it relates to contract work. In our view, such an ordinance is inconsistent with section 241 of the charter, which requires the letting of the contract to the lowest responsible bidder.

The decree is affirmed, with costs.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

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DETROIT LUMBER CO. *v.* AUXILIARY YACHT "PETREL."

1. COURTS—JURISDICTION—CIRCUIT COURTS — POWER OF LEGISLATURE.

It is within the power of the legislature to confer jurisdiction upon the circuit court in cases involving any amount.

2. SAME—JUSTICES OF THE PEACE—JURISDICTION—CONSTITUTIONAL LAW.

Under section 18, article 6, of the Constitution, the legislature has the power to withdraw any cause from the jurisdiction of justices of the peace.

3. SAME—OPINIONS—DICTUM—AUTHORITY.

A statement in an opinion of the court which is properly characterized as dictum is entitled to no greater weight than would be given it as an expression of an opinion of the justice writing the opinion.

4. MARITIME LIENS — ENFORCEMENT — JURISDICTION — CIRCUIT COURTS.

Under sections 10789 and 10790, 3 Comp. Laws, providing for the enforcement of liens on water craft, the circuit court has jurisdiction of proceedings brought for that purpose, notwithstanding the amount of the claim is less than $100.

Certiorari to Wayne; Murphy, J. Submitted June 16, 1908. (Docket No. 120.) Decided July 1, 1908.

Proceedings under the water-craft law by the Detroit Lumber Company against the auxiliary yacht "Petrel." There was an order dismissing the proceedings for want of jurisdiction, and claimant brings certiorari. Reversed.

E. T. Berger, for claimant.

Trevor & Bumps, for defendant.

MONTGOMERY, J. The proceeding was instituted under the water-craft law, so-called, to recover for certain lumber and materials supplied to the owners and used in the building, fitting out and furnishing the yacht "Petrel." The amount of the complainant's claim is $60.93 and interest. When the case came on for hearing before the circuit judge, a motion was made by the defendant to dismiss the proceedings for want of jurisdiction, on the ground that, the amount involved being less than

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$100, there was no jurisdiction in the circuit court to try the case. This motion was granted, and the ruling on that motion presents the only question for our consideration.

The defendant contends that the case of *Dewey* v. *Duyer*, 39 Mich. 509, should control this case. In that case the question presented was whether the mechanics' lien law conferred jurisdiction upon a court of chancery where the amount involved was less than $100. The statute governing the courts of chancery contains the provision that the courts of chancery shall dismiss every suit concerning property except suits between copartners and suits for the foreclosure of mortgages where the matter in dispute does not exceed $100. In view of the existence of this statute, and of the absence of any express conferrence of jurisdiction in cases involving less than $100 in the lien statute itself, the court held that the court of chancery had not jurisdiction to enforce a mechanics' lien for less than $100, the court saying: "Implications in favor of jurisdiction cannot be much indulged."

It is beyond question that the legislature has the power to confer jurisdiction upon the circuit court in cases involving any amount. Section 18, article 6, of the Constitution, provides that in civil cases justices of the peace shall have exclusive jurisdiction to the amount of $100 and concurrent jurisdiction to the amount of $300 (which may be increased to $500) with such exceptions and restrictions as may be provided by law. Any legislation, therefore, which clearly withdraws from the jurisdiction of the justices of the peace any cause is within the constitutional power of the legislature, and the only question presented is whether the water-craft law expresses with sufficient clearness the intention to repose in the circuit court jurisdiction of cases involving a lien against vessels without regard to the amount.

In *Milroy* v. *Mining Co.*, 43 Mich. 237, it was said that the circuit courts are given jurisdiction in claims against boats and vessels irrespective of the amount

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claimed. It is properly said in defendant's brief that this was dictum. It is therefore entitled to no greater weight than would be given it as an expression of an opinion of the justice writing the opinion.

The real question is, What was the intent of the legislature, as expressed by the act? Undoubtedly the language of the statute, section 10790, 3 Comp. Laws, is broad enough to confer jurisdiction in the circuit court over the claim of any person claiming to have a lien specified in section 2 of the act (section 10789). In fact it would be necessary to introduce an exception by implication in order to exclude from the jurisdiction of the circuit court claims involving less than $100. But when we take into account the purpose of the act, which was to protect labor and seamen's wages, as well as subcontractors and materialmen, and when the fact—of which we may take judicial notice—is considered, that accrued seamen's wages very rarely aggregate $100, the inference is strong that the purpose was to confer jurisdiction in this class of cases without regard to the amount. It is specially provided by section 10833 that in suits for seamen's wages, no security for costs shall be required except by special order of the court or judge thereof upon motion and notice and for good cause shown, thus showing that one of the first objects of the statute was the protection of seamen. We think that the terms of the act do not render it necessary to give it a construction which shall defeat the purpose of the legislature, but, on the contrary, that all claims under this statute are by section 10790 brought within the jurisdiction of the circuit court, and that there is nothing in any other provision of the act or in any other statute which should, in view of the special purpose of this act, be held to exclude by implication claims of less than $100.

The judgment is reversed, and a new trial ordered.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

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PEOPLE v. ANDRE.

1. FALSE PRETENSES — OWNERSHIP OF PROPERTY — MORTGAGES — DEEDS—CONTRACTS—EFFECT—INSTRUCTIONS.

In a prosecution for false pretenses, the evidence showed that respondent, being indebted to his father, conveyed to him a half interest in certain real estate as security. Thereafter, at the request of certain other creditors, the father and son conveyed the property to the wife of one of the creditors, taking a contract in the name of the son which provided for payment of the indebtedness and that he should remain in possession of the premises. *Held*, that the title to the property was in the respondent, and that an instruction submitting the question of ownership, and the falsity of his representations as to his ownership of the property to the jury as an open one was reversible error.

2. SALES—REMEDY OF VENDOR—STOPPAGE IN TRANSITU.

Though the delivery of goods by a vendor to a common carrier is, in law, a delivery to the vendee, the vendor retains the right of stoppage in transitu.

3. FALSE PRETENSES—EVIDENCE—ADMISSIBILITY.

In a prosecution for false pretenses inducing a sale of goods on credit, it appeared that respondent referred the complaining witness to a bank, where he had filed a financial statement. The complaining witness, after he had delivered the goods to a carrier for transportation to respondent, and before delivery by the carrier to him, made inquiry of the bank and was informed that respondent had filed a statement showing he was worth a large sum specified above his liabilities and exemptions. *Held*, that the statement, together with evidence that it was false, was admissible as bearing upon respondent's intent in making the representations.

4. SAME.

If the jury found, in accordance with his testimony, that, except for said statement on file in the bank, the complaining witness would have stopped the actual delivery to respondent, they would have been authorized to find that the shipment was made in reliance upon that statement.

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5. SAME—HARMLESS ERROR.

Where, in a prosecution for false pretenses, respondent admitted his insolvency at the time the representations complained of were made, the error, if any, in admitting in evidence a circular, subsequently made by respondent's attorney in involuntary bankruptcy proceedings, showing a statement of respondent's financial condition, was not prejudicial.

6. WITNESSES — COMPETENCY — PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

Statements made by respondent at a conference between respondent, his attorney, and others were not confidential, and hence not privileged, and the attorney may testify thereto.

Exceptions before judgment from Eaton; Smith, J. Submitted June 12, 1908. (Docket No. 117.) Decided July 1, 1908.

William Andre was convicted of obtaining money by false pretenses. Reversed.

Frank A. Dean, for appellant.

Elmer N. Peters, Prosecuting Attorney, for the people.

BLAIR, J. Exceptions before sentence to review conviction of obtaining money by false pretenses. Defendant Andre was engaged in the business of buying and selling eggs, poultry, etc., at Grand Ledge, under the title of the Grand Ledge Cold Storage Company. The complaining witness, George J. Scoefield, of Eaton Rapids, having seen Mr. Andre's advertisement for the purchase of eggs, went to Grand Ledge on the 28th of April, 1906, and proposed to sell eggs to Andre. In the course of this interview, it is alleged, the false representations relied upon were made. The information sets out the false pretenses and the furnishing of the eggs in reliance thereon, as follows:

"That he, said William Andre, was the owner of the Grand Ledge Cold Storage plant, located at Grand Ledge, Michigan, and that he, the said William Andre, desired

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to purchase eggs for the purpose of storage, which said eggs were to be stored in the east by said William Andre; that he desired to secure as many eggs as possible, and was, therefore, willing to spring the price in order to secure early eggs for said purpose of storage; that the storage at Grand Ledge was to be used by him, the said William Andre, later for the purpose of storing butter; that he, the said William Andre, on the date aforesaid, also gave to said George J. Scoefield the name of the Grand Ledge State Bank as a party to whom he could refer to make inquiry as to said William Andre's financial condition and responsibility; that thereafter, and on, to wit, the seventh day of May, A. D. 1906, the said George J. Scoefield inquired of the said Grand Ledge State Bank as to the financial standing and responsibility and honesty of the said William Andre, and was then and there informed by the cashier of said Grand Ledge State Bank that it, the Grand Ledge State Bank, had on file a statement made by the said William Andre, which showed that the said William Andre was worth the sum of eighteen thousand dollars over and above all debts, liabilities and exemptions; and believing the false pretenses and representations so made as aforesaid by the said William Andre, he, the said George J. Scoefield, was then and there deceived thereby, and was then and there induced by means of said false pretenses and representations so made as aforesaid to deliver, and did thereafter and on, to wit, the 11th day of May, A. D. 1906, deliver to said William Andre 18 cases of eggs of the value of $111, and did on the 12th day of May, A. D. 1906, deliver to said William Andre 150 cases of eggs of the value of $700, all of the value of $811 of the property of him the said George J. Scoefield; that the said William Andre did then and there, designedly and by means of said false pretenses and representations made as aforesaid, unlawfully and fraudulently obtain from the said George J. Scoefield the said 168 cases of eggs, of the goods and property of the said George J. Scoefield with intent then and there to cheat and defraud him, the said George J. Scoefield, of the same; whereas in truth and in fact the said William Andre was not, on said 28th day of April, A. D. 1906, the owner of the said Grand Ledge Cold Storage plant, and did not desire to purchase eggs for the purpose of storage, and said eggs were not to be stored in the east by said William Andre, and the said William Andre was not springing the price in order to secure early eggs for

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the purpose of storage, and the said William Andre was not worth the sum of $18,000 over and above all debts, liabilities and exemptions, all of which pretenses and representations so made by the same William Andre as aforesaid, were false in fact, and were, at the time and place aforesaid, well known by the said William Andre to be false and fraudulent."

On the 12th day of May, 1906, Mr. Scoefield shipped to Andre from Eaton Rapids 150 cases of eggs at a value of between eight or nine hundred dollars, for which he received checks on the 16th or 17th of May, which were protested for nonpayment. On the 14th of May, Mr. Scoefield, having become suspicious, called up the Michigan Tradesman at Grand Rapids, who informed him:

"They were not thoroughly convinced about his being all right and that he had no authority to use them as reference. I then called up the cashier of the Grand Ledge State Bank thinking that he would know more about it than anybody else, he being near by. He told me that Andre had a statement on file which he had every reason to believe was true to the effect that he, Andre, was worth $18,000 over and above everything and that his reputation for honesty and so forth was good. My intention was if I received an unfavorable report to stop the eggs en route or to have them replevied if he had them in his possession. I never received my pay for those eggs shipped on those two days. I was deceived by those representations that Mr. Andre had made to me as to his ownership of the property and purpose in buying them and paying that price as I have testified; and I was deceived by the report made to me by the cashier of the Grand Ledge State Bank."

The car of 150 crates of eggs shipped by Scoefield to Andre was consigned to the Grand Ledge Cold Storage Company, which, according to Andre's testimony, was composed of himself, and arrived at Grand Ledge on May 15 at ten o'clock p. m.

The court, after reading the information to the jury, instructed them that they could not consider the statement of the respondent filed with the bank and the representations made by the bank to the complainant Scoefield as

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causes which induced Scoefield to deliver his eggs to the respondent:

"For the reason that it is undisputed that the eggs were delivered to respondent before complainant Scoefield had any knowledge of the said statement in the bank; in other words, such bank statement cannot be considered as false representations on the part of the respondent by which Scoefield was induced to part with his property. You should, however, gentlemen, consider that proof with the other proof in the case on the question of his intent, that is, you should consider it with all the other proof in the case to determine whether the statements made by respondent as to his ownership of the cold storage plant at Grand Ledge and his desire to purchase eggs for the purpose of storage in the east and statements connected therewith, should you find from the proof he made such statements as to the ownership and the other statements connected therewith, you should consider them to determine whether they were designedly false and made to induce Scoefield to part with his property and were successful."

The only false representations submitted to the jury, as appears from the charge of the court and as stated by the prosecuting attorney, were: (1) that Andre was the owner of the cold storage plant; (2) that he was springing the price of eggs for the purpose of securing early eggs to be stored in the east and that he was storing them in the east.

Numerous assignments of error are presented, several of which are abandoned by counsel for respondent, and we shall only consider those which we deem important for the purpose of disposing of the case.

1. It is argued that the representation by respondent that he owned the property on the 28th day of April, 1906, was not false, and that the court erred in submitting that question to the jury as an open question. It appears from the record that in February, 1906, the title to the real estate in question stood in the name of respondent Andre and his father, Herman Andre. Respondent testified, and his testimony was the only testimony upon the subject in the record, that, prior to the deed to Mrs. Berry hereinafter referred to, he deeded to his father,

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Herman Andre, a half interest because "he said I ought to be protected, and I said, 'I will deed you a half interest in this property,' which was some time in January, 1905, 'to secure you for what I owe you.' He said, all right, and I deeded him a half interest in the property."

Mr. Briggs, one of the three owners of the Loan & Deposit Bank of Grand Ledge, a private bank, testified:

"Mr. Andre has been a borrower at my bank and did business with us 8 or 10 years, stopping on the 1st of February, 1906. At that time he was indebted to Mr. Berry, the president of the bank, to the amount of about $9,600 which was secured by a real estate mortgage and also a trust deed to Mrs. Berry, wife of the president of the bank, subject to mortgage. Deed from William Andre and wife and Herman Andre and wife to Jennie M. Berry, introduced, marked Exhibit A and read in evidence, the description of the property in said deed being the same as the description of the property contained in Exhibit B. At the same time the deed was executed a contract was executed to Mr. Andre which is marked Exhibit B and reads as follows."

The contract was in most respects the usual form of land contract, in which respondent agreed positively to pay—

"Nine thousand six hundred twelve and ninety-six one hundredths ($9,612.96) dollars, in the manner following, to wit: On or before October 1st, 1906, with lawful interest from the date hereof, at the rate of six per cent., payable every thirty days upon so much of the purchase money as remains unpaid."

It also contained the following clause:

"It is mutually agreed by and between the parties hereto that in case of the payment of the said sum of nine thousand six hundred twelve and ninety-six one hundredths dollars, or any part thereof, by the said second party, that first party will promptly apply any and all payments on said second party's indebtedness to the banking firm of Berry, Briggs & Berry, and it is also understood that said second party has the right to make payments of any amount on this contract."

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Mr. Briggs further testified:

"The purpose of having this contract and deed executed was to get possession of the property and save the time and expense of a foreclosure of the mortgages."

This contract was executed on the 16th day of February, 1906. It further appears from Mr. Briggs' testimony that the bank held a chattel mortgage as additional security.

Mr. Alexander, attorney for the Loan & Deposit Bank, testified:

"I commenced proceedings before a circuit court commissioner to oust him from the property after the expiration of the contract and you, Mr. Zimmer, appeared as attorney for Mr. Andre and raised the objection that the circuit court commissioner had no jurisdiction and that proceedings must be had by foreclosure. I took judgment by default and proceeded to oust Mr. Andre but have since commenced proceedings by foreclosure, in chancery, to get possession of the property. The title to the property was not in Mr. Andre on the 28th of April last. It was in Jennie M. Berry. It did not pass to her absolutely, but passed to her subject to the condition of the contract October 1, 1906."

We are of the opinion that the respondent's assignment of error is well founded and the court should have instructed the jury, as a matter of law, upon this record, that the title and ownership of this property was in the respondent. The case falls directly within the case of *Clark* v. *Landon*, 90 Mich. 83, and is even stronger, because in the case at bar the contract provided that respondent was to remain in possession of the premises. See, also, *Flynn* v. *Holmes*, 145 Mich. 606.

The case is entirely dissimilar from *Reed* v. *Bond*, 96 Mich. 134; *Blumberg* v. *Beekman*, 121 Mich. 647, and like cases. In the case at bar, the indebtedness was kept on foot and was not discharged nor intended to be discharged by the contract.

The fact that the title originally stood of record as in respondent and his father, Herman, is of no consequence, if his interest was conveyed to him as a security, as testi-

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fied to by respondent, and under the facts of this case ceases to be of consequence for the reason that Herman agreed to the transaction and conveyed the property to Mrs. Berry, the wife of the president of the bank, with reference to the contract placing the entire title in the name of respondent.

2. Defendant's counsel contend with reference to the introduction of the financial statement filed by respondent with the bank:

"Its introduction in evidence was flagrant error and laid the foundation for the subsequent testimony of Kilbourne, Briggs, Alexander, and the circular letter of T. Rogers Lyons, attorney for Andre in bankruptcy hereafter to be noted. It had no relevancy to the issue, but raised a false issue to prejudice the jury and allowed the prosecution to introduce testimony of the financial status of the bankrupt's estate months after the offense was committed."

We do not think the judge erred in his instruction to the jury that this financial statement could be considered by them in determining respondent's intent in making the alleged representations to Scoefield nor in permitting testimony to show that the financial statement was false. Moreover, we are of the opinion that the prosecution were entitled to go to the jury upon the question whether Scoefield relied upon this financial statement and was induced thereby to make the shipments of eggs in question. The mere fact that the information alleged dates earlier than the delivery to the common carrier as the dates upon which Scoefield relied upon the false representations in making shipments is not controlling. While a delivery to the railway company was, in law, a delivery to the respondent, still, the vendor retained the right of stoppage in transitu, and if the jury found, as the agent of the Pere Marquette railroad testified, that "that car arrived at 10 p. m. May 15," Scoefield could have stopped its delivery at any time, at least prior to that hour. And if the jury found, in accordance with his testimony, that, except for the state-

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ment from the bank of the financial standing of respondent as shown by his statement on file obtained in the meantime, Scoefield would have stopped the actual delivery to respondent, then we think they would have been authorized to find that the shipment really was in reliance upon that statement.

3. That the court erred in admitting in evidence a circular letter issued to the creditors of William Andre, against whom involuntary bankruptcy proceedings had been instituted, by his attorney, Mr. T. Rogers Lyons, for the purpose of informing them that a composition had been offered and furnishing a statement of the affairs and condition of the bankrupt estate. This circular was offered with the following statement by the prosecuting attorney:

"I claim this circular states—showing an indebtedness of $50,000 and assets of $18,000, 25 per cent. of the fifty would be $12,500. It shows they are seeking even now to get a compromise of the creditors by means of the representations they made in this and there would be a difference between $12,500 and $18,000.

"*The Court:* I think that may be admitted."

Although it appears that respondent knew of the contents of this circular and distributed several of them, we do not think the circular prepared and signed by the attorney for the purpose of obtaining a composition sometime after the making of the alleged false representations was admissible for the purpose alleged, although it is not apparent how the introduction of the circular could have prejudiced the respondent, who admitted an indebtedness largely in excess of his assets existing at the time the representations were made.

4. That the court erred in permitting the testimony of Mr. Kilbourne to be given, who, at the time to which his testimony related, was acting as attorney for Mr. Andre. The testimony related to a conference at the office of Mr. Alexander between Mr. Andre and his attorney, Mr. Kilbourne, on the one side, and Mr. Alexander and Mr. Briggs, upon the other. The statements made at this

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conference were evidently not confidential in any respect and were, consequently, not privileged. *Cady* v. *Walker*, 62 Mich. 157; 23 Am. & Eng. Enc. Law (2d Ed.), 73. We are also of the opinion that the testimony was admissible as against the grounds of incompetency, immateriality, and irrelevancy.

For the error in submitting the question of ownership of real estate to the jury, the conviction is reversed, and a new trial granted.

GRANT, C. J., and MOORE, CARPENTER, and MCALVAY, JJ., concurred.

BOLGER *v.* COMMON COUNCIL OF THE CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS—DETROIT CHARTER—OFFICERS—REMOVAL—PROCEDURE.

   Under section 4, Act No. 417, Local Acts 1901, amendatory of the charter of Detroit, providing the procedure for removal of the commissioner of parks and boulevards, the commissioner can be removed only upon a showing of legal cause, the legal sufficiency of which cause is a question for the court.

2. SAME—GROUNDS OF REMOVAL—CHARGES—SUFFICIENCY.

   Charges of gross neglect of duty by the commissioner, consisting of failure to protect the city in contracts let by him and to inspect or provide for proper inspection of public work being done under his direction, examined, and *held*, legally sufficient, if sustained by the proof, to authorize his removal.

3. SAME—GROSS NEGLECT OF DUTY—WHAT CONSTITUTES.

   Gross neglect of duty, justifying the removal of a public officer, is not limited to intentional official wrongdoing, but extends to any neglect of official duty which permits the public interests to be injured or endangered, and which, from the gravity of the case, or the frequency of instances, becomes so serious in its character as to endanger or threaten the public welfare.

4. SAME—RELIANCE UPON SUBORDINATES—RESPONSIBILITY.

   The commissioner, having authority to "employ and at his pleasure discharge superintendents, engineers," etc., though entitled to rely to some extent upon their reports, could not rely upon them wholly, nor to the extent that he might if they were appointed by others and not entirely subject to his own discretion; and in proceedings for his removal it was a question for the council whether it was not gross negligence for him to rely upon his subordinates to the extent which the evidence indicated he did.

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5. SAME—EVIDENCE—SUFFICIENCY.
Evidence in proceedings to remove the commissioner for gross neglect of duty examined, and *held*, to support the finding of guilty, especially as the six judges of the Wayne circuit court unanimously came to the same conclusion.

6. SAME—TRIAL—VIEW—PROPRIETY.
The proceedings being based upon charges of gross neglect of duty in respect to public improvements being done under the commissioner's direction, it was competent for the council to examine the work in order to have a better understanding of the testimony, especially where such examination was made in the presence of counsel for the commissioner and without objection from him.

7. SAME—REVIEW—CERTIORARI—SCOPE.
The action of the council in removing the commissioner, upon charges of gross neglect of duty, was properly sustained upon certiorari, against the objection that the council should have voted separately upon each charge and specification thereunder, and upon the question of removal, since the writ, being largely discretionary, is not granted in such cases upon purely technical grounds, and it is presumable that each alderman who voted for the affirmative upon the resolution of removal passed upon every one of the charges and specifications enumerated therein, and upon the question of removal.

8. SAME—NEGLECT OF DUTY—FINANCIAL LOSS TO CITY.
The facts that the city was fully protected against financial loss by bonds; that the work had not been finally accepted by the commissioner; that the contractors were bound to make good all defects in work or materials; and that the commissioner, according to his testimony, intended to make an accurate final inspection of the completed work and to require it to conform in all respects to the contract, were not so inconsistent with the charges of gross negligence as to invalidate the findings of the council, since it was the duty of the commissioner to inspect the work as it proceeded, and the bonds and the provisions of the contract did not dispense with the necessity for careful supervision, but furnished an additional remedy in case, with proper inspection during its progress, the improvement was found in any respect imperfect.

9. SAME—DEFENSES—LACK OF FINANCIAL LOSS—EFFECT.
If, acting upon competent evidence, the council were satisfied that the commissioner's performance of his duties evidenced such gross negligence as to indicate that his further continuance in office would be a menace to the public, his removal would not be improper for the reason that, in the end, the city would suffer no financial loss.

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10. SAME—LOSS TO PUBLIC—FINANCIAL LOSS.

Because the contractors had given bonds for the protection of the public against any money loss, it does not necessarily follow that no loss would have been suffered, since the inconvenience of the public during the period when necessary repairs or rebuilding would have to be done, a period in which, had the contract been performed according to its tenor, the public would have been entitled to the free and unobstructed use of the improvement, is an element of loss quite as important and worthy of consideration as a mere financial loss.

Error to Wayne; Brooke, Rohnert, Mandell, Donovan, Hosmer, and Murphy, JJ. Submitted June 19, 1908. (Docket No. 71.) Decided July 1, 1908.

Certiorari by Robert E. Bolger to review proceedings by the common council of the city of Detroit to remove plaintiff from the office of commissioner of parks and boulevards. There was judgment sustaining the proceedings, and plaintiff brings error. Affirmed.

Alex. J. Groesbeck, *Edwin Henderson*, and *John J. Speed*, for appellant.

Frazer, *Griswold & Slyfield*, for appellee.

BLAIR, J. The record in this case is before us upon writ of error to review proceedings before the full bench of the circuit court for the county of Wayne upon common-law certiorari to the common council of the city of Detroit, to review their action in removing the plaintiff in error from his office as commissioner of parks and boulevards.

On the 30th of January, 1906, the committee on parks and boulevards of said common council preferred certain charges against Mr. Bolger, of which the council found the following were sustained by the proofs:

"*First Charge.* Your committee charge that Robert E. Bolger, commissioner of parks and boulevards of the city of Detroit, was and is guilty of gross negligence and unlawful conduct in his office, in connection with the contracts let to Thomas Kennedy, for the paving of Lafayette boulevard, and on the Eastern boulevard, St. Aubin to Chene and Mack to Gratiot.

"*Specification.* The contract for said work, the specifications and blue print drawings called for eight inches of concrete behind the curb, six inches below the curb

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and six inches in front of the curb. These specifications were deliberately and intentionally disregarded by the said contractor, and the men laying the same were instructed not to put in the quantity of concrete required by the said plans and specifications; that in many instances dirt was thrown in behind the curb in the place of concrete, large and unsuitable stone without sufficient quantity of cement to bind them together, and the quantities of stone were greatly in excess in size of that required by the contract and specifications to constitute the concrete, and there was not enough cement used. That this condition of affairs was known to said commissioner, and that he was present upon the work and saw the concrete being put in behind the curb stone contrary to the specifications and blue prints which he had furnished to the contractor.

"*Second Charge.* We charge the said commissioner with neglect of his duties, unfitness and incompetency in the discharge of his duties in the matter of contracts with Lennane Bros., for paving the Boulevard, Vinewood to the railroad, Visgar to Buchanan and Hancock to Holden, and the speedway, and with Thomas Kennedy, in the matter of contracts as above mentioned.

"*First Specification.* That he did not furnish a sufficient number of inspectors upon the construction of the Boulevard pavement under the contracts let by him to Kennedy and to Lennane Bros., although he was informed they were needed, and that some of the work was done without any inspection at all. * * *

"*Third Specification.* That the commissioner, Robert E. Bolger, while frequently upon the work himself, made no inspection of the work whatever and that if he had done so he could easily have seen that the work was improperly done; that he did not provide competent men or sufficient number of men to make the inspection in case that he was unable to do so, or provide them with full profiles, drawings, plans and specifications, so that the inspectors could do competent and proper work.

"*Fourth Specification.* That the construction of the roadbed of said Boulevard paving was improperly and negligently done; that the limestone used was larger than the specifications permitted; that said roadbed was not in some places excavated as deep as it should have been excavated. That false amounts of excavation and of square yardage of pavement and of sewer pipe and of curbing were called for in the specification to a large

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amount on the Lennane and Kennedy contracts above mentioned. That other portions of the road were not constructed in accordance with the requirements of the specifications; that the roadbed was not flooded and rolled, nor the different layers of stone as prescribed in the specifications; that granite or trap rock were not used as specified, screenings were not used to fill up the openings in the limestone, granite or trap rock, and that in other particulars the construction was imperfect and not in accordance with the terms of the specifications thereof, as said commissioner should have known, and might easily have discovered if he had properly discharged his duties, and given that inspection which his position required him to give.

"*Fifth Specification.* That said commissioner was aware before he let the said contract to Kennedy of his reputation for doing faulty work, and that said Kennedy would not be likely to do the job properly if the job were let to him, and that said commissioner disregarded these warnings. That said commissioner himself well knew said Kennedy's reputation, and knew the necessity of a close inspection of all the work done by him; that said commissioner, Robert E. Bolger, disregarded this fact and put an inadequate number of inspectors on the job. * * *

"*Fourth Charge.* Your committee charge that said Robert E. Bolger, commissioner of parks and boulevards, was grossly negligent in letting the contract for the construction of the Boulevard pavement in this: * * *

Fifth Charge. We charge that said commissioner was grossly negligent in accepting the estimates by Ray of work done and material furnished and making payment upon these estimates without proper investigation and scrutiny; that said Engineer Ray was a man of his own appointing and he had power to discharge him at will; and we charge that at no time from the beginning of the work until the end, did the commissioner give such personal attention to the inspection of the work and of the work itself as his manifest duties required him to do, and in this he was guilty of gross negligence. * * *

"*Eighth Charge.* We charge said Robert E. Bolger with incompetency, unfitness, gross neglect of duty in this:

"*Specification.* (*a*) That he adopted and approved plans, specifications, blue prints, and estimates for paving to be done upon the boulevards which were not designed

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to and did not protect the best interests of the city of Detroit.

"(*b*) That in violation of the law, he changed said plans, specifications and blue prints after the bids and proposals on the same were made and received, by cutting off said plans and specifications part of the cement curb; in changing the course of the pavement at Lafayette and the Boulevard, and in the hauling of dirt from the Vinewood avenue job to Clark Park, instead of to Atkinson Park, as provided in said specification; that said changes were all made in the interests of the contractor, stifled competition, and were not in the interests of the city of Detroit.

"(*c*) That he advertised for bids to make a speedway forty (40) feet wide on the Western Boulevard, and let the contract to Lennane Bros. for thirty (30) feet wide, without readvertising the same.

"(*d*) That he allowed concrete to be put behind the curbing without in any manner providing for the composition or the component parts of the same, either as to stone, cement or other ingredients.

"(*e*) That he accepted bids on said work and let the contracts for the same without designating therein the kind of cement and without the bidders naming the kind of cement to be used.

"(*f*) That the reinforced cement curb was not constructed according to the specifications, but that the iron pipe of one inch dimension and the reinforcing rods and wires were not put therein as required by the specifications; that in about half of said work the same were entirely omitted, which was well known to said commissioner, or could have been easily known, had he made a personal inspection or provided for adequate and proper inspection of said work. * * *

"*Eleventh Charge.* That said Robert E. Bolger was and is guilty of unlawful acts in his office as park and boulevard commissioner, of gross negligence in the performance of his duties in said office, maladministration, incompetency and unfitness therein."

Certain other charges upon the application of Mr. Bolger for writ of prohibition were stricken out upon the hearing of that application by the court and the council was directed to proceed to a hearing upon the remaining charges.

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On the 20th day of February, the common council took up the hearing of testimony in the case and continued said hearing until the 9th of April, when it passed the following resolution:

"It is resolved by the common council of the city of Detroit, and said council finds the facts as follows: That all said charges and specifications so preferred and heard and tried as aforesaid are true, and are hereby declared duly sustained, and established, except the second specification of the second charge, and the third charge, and the specification under the fourth charge. * * * And therefore be it resolved further, that said Robert E. Bolger be and he is hereby removed from the office of and as commissioner of parks and boulevards of the city of Detroit, on account of and by reason of being guilty of the said several charges and specifications as aforesaid."

All charges reflecting upon the integrity of the commissioner were found to be not sustained and he was exonerated from any intentional wrongdoing.

Section 4 of Act No. 417 of the Local Acts of 1901 provides:

"The said commissioner may be removed by a vote of two-thirds of the members elect of the common council, but only upon written charges and an opportunity to appear and defend with the aid of counsel."

Sections 5 and 6 contain the following:

"SEC. 5. The commissioner of parks and boulevards shall appoint a secretary, who shall hold office during his pleasure, and shall make all needful general rules and regulations for the transaction of business of his department, and may employ and at his pleasure discharge superintendents, engineers, clerks, agents and subordinates, and prescribe their compensation. All officers and appointees, or either of them, shall give security for the faithful performance of their trust, as said commissioner may require.

"SEC. 6. The commissioner of parks and boulevards shall have the control and management, and shall have charge of the improvements of all the parks and public grounds of said city, including the island park, known as Belle Isle park, and of such parks and public grounds as

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may hereafter be acquired, laid out, purchased or dedicated for public use in said city. And he shall likewise have the control, management and charge of the improvement and maintenance of the boulevard, which was laid out and established by the act creating said board of boulevard commissioners, and of any other boulevard which may at any time be hereafter acquired, laid out, established or located by said city."

At the hearing in question, Mr. Bolger was present at all the sessions, which occupied some 24 days. He was represented by counsel at all the hearings and testified fully in his own behalf. The resolution of removal was adopted by a majority of 23 to 11, constituting the necessary statutory number.

The same questions which are raised before us now were presented to the full bench of the Wayne circuit court and were resolved against the plaintiff in error by that court in a unanimous opinion, with which we might well content ourselves without further remarks. Inasmuch, however, as counsel for plaintiff strenuously insist that that there was no competent evidence presented before the council to sustain any of the charges or specifications, even if the same were sufficient in form, we briefly consider that question.

We agree with counsel for plaintiff in error that the provision of section 4 of the act of 1901 above quoted requires a showing of legal cause for removal and that the legal sufficiency of the cause of removal is a question for the court. We are of the opinion, however, that with the exception of the 4th and 11th charges, the charges were legally sufficient to authorize the removal of the commissioner, if sustained by the proof. In determining whether the charges were sustained by the proof, reference must be had to the powers conferred upon the commissioner.

It is contended by counsel for plaintiff in error:

"Only gross negligence resulting in damage will justify the removal of the incumbent of an office of the dignity and importance of the commissioner of parks and boulevards. Gross negligence is the intentional failure to per-

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form a manifest duty. *Schindler* v. *Railway Co.*, 87 Mich. 411.

"Negligence is the unintentional failure to perform a duty implied by law, whereby damage naturally and proximately results to another. 21 Am. & Eng. Enc. Law (2d Ed.), p. 457."

In *Attorney General* v. *Jochim*, 99 Mich. 358, it was held that the secretary of State, State treasurer, and commissioner of the State land office, while acting as members of the board of State canvassers, were guilty of gross neglect of duty in certifying as correct a tabulated statement prepared by their clerks in reliance solely upon the statement of said clerks that said tabular statement was correct. In the course of the opinion by Mr. Justice HOOKER, he said:

"We come next to the charges. It is contended that they are insufficient, because the act is not alleged to have been intentional, and because it was not gross neglect to permit an erroneous canvass by clerks. * * * A mere failure to certify could be called 'neglect.' What shall be said of it when the certificate is made without knowledge of, or any attempt to ascertain, the fact? * * * Looking at the circumstances from his official standpoint, the governor may well have said this, though not willful, was only possible by reason of the grossest neglect of official duty. It certainly was someone's duty to move at once with a view to the correction of the error, and the prevention of its recurrence. While there is an inclination upon the part of the average American to accept good intentions as an excuse for mistakes, it is not for the general public good that responsible public offices shall be confided to, or remain in the custody of, those whose duties and responsibilities rest so lightly upon them as to permit the public interests to be injured or endangered through neglect; and when such neglect, from the gravity of the case, or the frequency of the instances, becomes so serious in its character as to endanger or threaten the public welfare, it is gross, within the meaning of the law, and justifies the interference of the executive, upon whom is placed, by this amendment, the responsibility of keeping the affairs of State in a proper condition. We cannot think that the term 'gross neglect' means only intentional

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official wrongdoing. Such acts would hardly be described by the word 'neglect.'"

While it is true that the act held to be gross neglect in the *Jochim Case* was one required to be personally performed by the officer himself, we think the definition of gross neglect given in the case is applicable to this case. It will be seen from the provisions of the statute relative to his office, that the commissioner is given very extensive powers,

"And may employ and at his pleasure discharge superintendents, engineers, clerks, agents and subordinates and prescribe their compensation."

While we agree with counsel for plaintiff in error that the commissioner was not required to abandon the performance of his other duties and give his entire time to the performance of the Boulevard work, and while he might, to a certain extent, rely upon the reports of his engineer as to scientific matters, which would not be expected to be within his knowledge, and, to a certain extent, upon the reports of his inspectors, it was not competent for him to rely wholly upon them or to the same extent that he might rely upon them if they were appointed by others and not entirely subject to his own discretion. They were his employés and agents and not the municipality's, subject to his arbitrary will, aiding him in the performance of the duties required of him, and he may justly be held responsible, to a large degree, for their performance of the duties delegated to them. We think it was a question for the council in this case, whether it was not gross negligence in him to rely upon these officers to the extent to which the record indicates he did.

The testimony in this case is too voluminous for us to undertake to set forth those portions tending to sustain the several charges, but, as an illustration, we quote certain portions of the evidence in support of the third specification of the second charge.

Inspector Benedict, appointed by Mr. Bolger, testified:

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"I didn't have the specifications for a week or ten days after I was there, and I went to Mr. Busch and he says: 'Have you got the contract, I mean the specifications,' and I said, 'No,' I said, 'I have not, and I do not know much about what is to be done,' and he said, 'I will see to that.' The next day he brought me up a contract; I mean the specifications. He did not bring me any blue print. Some days after I asked him about that. I says, 'I want something to show the grade and measurements,' and he said: 'I will bring you one,' and he did. He brought me a blue print and a cross cut of the work on the road and the curb. In a week or ten days before I got the specifications. Up to that time they had not been laying any curb. * * * When I went up on to the St. Aubin job no one was left on the Mack job as inspector. When I was down on the Mack job no one was up on the St. Aubin job as inspector. * * * I should say I was two or three weeks up there on that job before I came back again.

"*Q.* While you were up there two or three weeks there was no one left in your place to inspect the other job?

"*A.* No, sir. * * *

"*Q.* During your absence on the St. Aubin job they would be doing work upon the Mack job?

"*A.* Yes.

"*Q.* And there was no one there to inspect it as an inspector?

"*A.* Not to my knowledge. * * *

"*Q.* Was it possible for you to watch all of that work?

"*A.* Not and know that it was done properly. * * *

"*Q.* How many men were needed there on that work to inspect it properly and see that it was done right?

"*A.* At the time, all the time there were two curb setters working there should have been at least three men. The last two weeks or two and a half I was there I told Mr. Busch that I would have to have help in looking after it, and have it done properly, not only the curb setting, but they were leveling down these stones and putting them down, and I said: 'I am satisfied you want someone to look after that.' He said: 'I will chase somebody up there to help you.'

"*Q.* The work that you were doing there was really the work of three inspectors, or ought to take, rather, three inspectors to do that work properly?

"*A.* To watch it and know that it was done properly,

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because I knew they were beating me all they could, and to watch it as it should be watched it needed more inspectors.

"*Q.* Then, in your judgment, based on your experience, there was not a sufficient number of inspectors on that work?

"*A.* I don't think there was. * * *

"*Q.* How often did you see Commissioner Bolger on that work?

"*A.* Well, at the first, when I went up there, he was up there to the best of my recollection, he was up there two or three times a week.

"*Q.* Was he ever up there when he could see these conditions were present that you talk about?

"*A.* He was up there, if I remember right, once when I was setting the curb. I didn't see him until he hit me on the shoulder and touched me. I turned around, and saw Mr. Bolger, and he was right there on the ground, and I should say he was about two-thirds of the way from Mack up to Gratiot.

"*Q.* Was that one of the times when these conditions were present that you talk about?

"*A.* Yes, sir. I was working at the two streets and looking after the two men, two curb setters.

"*Q.* Did he speak anything to you that there was work going on here and over there, and ask you if you could keep track of those different gangs?

"*A.* Not in those words, he didn't. He wanted to know how things were going. I says we are doing the best we can and he told me to have it—to watch it and see that it was right up to the specifications, and see to it and have it done right, and I will stand by you.

"*Q.* Did you consider that he could see as well as you could how much you could do, or how little?

"*A.* I considered that he ought to know how much a man could do, how much he can look after.

"*Q.* And the conditions were present there where he could see them just as well as you could?

"*A.* They certainly were.

"*Q.* And was that one of the reasons that you did not care to speak to him?

"*A.* That was really the only reason. * * * I supposed that the concrete behind the curb was to be 6 inches, but now it turns out that it is 8 inches.

"*Q.* Did any one tell you that it was to be 6 inches?

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"*A.* Why, I always, I never heard anything but 6 inches. I never heard the word 8 inches mentioned by anybody until the committee came around on the upper north Boulevard, who was investigating, and one of the aldermen showed me that little bit of an 8, that figure 8 down in the cobble stone that I had never seen. * * *

"*Q.* Now, Mr. Benedict, speaking about this concrete behind the curb, as a matter of fact, in looking at that profile you overlooked the fact that there was 8 inches required behind the curb?

"*A.* That is right.

"*Q.* That is the truth of it?

"*A.* That is the truth of it.

"*Q.* And the fault of not having that concrete up to the requirements of the specifications, 8 inches, is due to an oversight in not seeing that 8 there?

"*A.* Yes. * * *

"*Q.* Didn't you know that your blue print called for 6 inches of cement in front of the curb, of concrete?

"*A.* No, I didn't know that.

"*Q.* You don't know that?

"*A.* I don't know that now.

"*Q.* As a matter of fact you put in 3 or 4?

"*A.* Yes, I didn't calculate to have it less than that."

Inspector Dilworth testified:

"*Q.* Now, as a matter of fact, with mixing boards 200 feet apart, Mr. Dilworth, don't you know that it needs two inspectors and haven't you said so?

"*A.* Why, it might need two inspectors, yes.

"*Q.* Doesn't it, as a matter of fact, to get a good job?

"*A.* Well, if you want to get it right down to a sixteenth of an inch I suppose you would have to do it.

"*Q.* But no, to get it down according to the specifications?

"*A.* It would be altogether on what kind of men you had on the board."

Inspector Beyers testified:

"I only got 5 inches of concrete behind the Berea curb. I was to blame for that. I made a mistake. I did not know they had changed from the usual way of putting it down. The usual way of putting it down is four inches to five, on city work. I inspected it the same as city

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work. I did not report to Mr. Bolger that we were putting in only five inches of concrete behind the curb. The matter did not occur to me until this investigation came up, that I was doing something there which was outside of the specifications. There might be between 5 and 6 thousand feet of that concrete behind the curb in there, between Hancock to Holden, the average width is 5 inches. * * * At one time I expressed to the superintendent, Mr. Busch, a desire to have an additional inspector. They were finishing up the concrete curb, and started in on the Berea, and there is a block's difference between those two jobs. I reported it to the engineer and superintendent. They said they would send up another inspector, but I guess they forgot it. * * * The first month Mr. Bolger was there almost every day. After that two or three times a week. * * *

"I calculated to put 5 inches of concrete behind the curb. I got that idea from the city work. I was not furnished with a blue print of that curb. If I had been there would have been 8 inches there. I went to work upon that curb and didn't know it required 8 inches of concrete; the result is, it averaged 5 inches, and 3 inches in front.

"*Q.* You know that your blue print called for 6?

"*A.* I know it now.

"*Q.* When did you find it out?

"*A.* When the committee came out there."

It was conceded by counsel for plaintiff in error in his argument to the council that his client had had a fair trial, so far as the council was concerned, and that he was before them for trial upon the charges largely because he was a victim of misplaced confidence. It was also conceded by counsel that the concrete behind the curb would have to come out.

Plaintiff's witness Chapoton testified:

"I examined the subgrade from Mack to Gratiot in 20 places about 100 feet apart.

"*Q.* About that? How did the subgrade run — read off your figures?

"*A.* Starting from Gratiot road down, the first is 10, 9½, 8, 9½, 8½, 10, 10, 7½, 9½, 10, 9½, 9, 9½, 10, 8, 9½, 9, 9, 10 and 9, making a total of 187, divided by the 20 places, made it 9⅓ inches.

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"*Q.* Very well, now then, the specification, do you know what they require on the subgrade, Mr. Chapoton; do you remember now?

"*A.* To be 10 inches down from the top of the curb.

"*Q.* That is the excavation of the roadway, isn't it?

"*A.* Yes, sir.

"*Q.* Now then, these specifications require all excavation shall be made to the depth as shown on profile after having been rolled?

"*A.* Yes.

"*Q.* Is that honest, fair work?

"*A.* Yes, sir.

"*Q.* To have a difference, a different depth from what is required by the specifications?

"*A.* No, sir.

"*Q.* It is not honest work, is it?

"*A.* No.

"*Q.* Would there be trouble in a contractor doing honest, square work there, to make that excavation originally?

"*A.* No, sir.

"*Q.* To the depth required by the profile, 10 inches, roll it and have it measured by the engineer?

"*A.* No, sir.

"*Q.* Isn't that the proper way where your specifications call for that?

"*A.* Yes, sir, I am sure.

"*Q.* That is the proper way? If there are any high places they can be taken off?

"*A.* Yes, sir.

"*Q.* And thrown up on the curb? These specifications require all filling; there may be depressions, and it takes a little careful work to get the subgrade right?

"*A.* Yes, sir.

"*Q.* These specifications require all filling shall be of earth or cinders and shall be deposited in layers of not more than 4 inches, then rolled; now, then, in view of these specifications, and your examination of this subgrade, do you mean to tell me, as a contractor, that that work is right, or has been done right?

"*A.* No, sir, it has not been done right.

"*Q.* In that particular this job from Mack to Gratiot is wrong, isn't it?

"*A.* Yes, sir. * * *

"*Q.* What you are testifying about, Mr. Chapoton, is

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not that this is up to specifications, not that it is a good job in that particular, but that you could fix it?

"*A.* Yes, sir.

"*Q.* That is all you mean to say about it, but on the other hand, it is not up to specifications, nor is it a good job?

"*A.* No, not unless it was made so.

"*Q.* So that upon the Mack avenue job the subgrade is wrong, isn't it?

"*A.* Not all over; there is some places it is all right, but they are very few.

"*Q.* Very few places?

"*A.* Yes.

"*Q.* Where it is right? The curbstone, so far as the material itself is concerned, is good?

"*A.* Yes, sir.

"*Q.* But the concrete under it is not good—I mean, not a sufficient quantity of concrete?

"*A.* There is on the bottom, but not on the side.

"*Q.* Not on the side?

"*A.* No, sir.

"*Q.* You say that has to be torn out?

"*A.* Yes, sir.

"*Q.* So that in that particular this job is not right?

"*A.* No, sir.

"*Q.* That is about all that has been done, isn't it?

"*A.* Yes, sir.

"*Q.* So that aside from the Berea being good Berea, and the limestone being good limestone, that job is no good?

"*A.* It can be made good.

"*Q.* I mean as it is?

"*A.* No, no.

"*Q.* It is no good and it is not up to the specifications?

"*A.* No, sir."

There was testimony indicating that the commissioner was quite frequently over the work and it appears from the testimony of Benedict and Beyers that they were, not merely once in awhile but all the time, putting in less than the 8 inches of concrete required back of the curbing and less than 6 inches required by the specifications in front of the curbing, and it was a fair question whether the commissioner could have remained ignorant of these facts

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unless he were more than ordinarily negligent. There are other matters also in the testimony as to which the jury might infer that a reasonable exercise of diligence would have informed the commissioner that matters were not going on properly with the work.

We do not deem it necessary to go further into detail in support of our view that there was competent evidence in support of the charges, particularly since the six learned judges of the Wayne circuit court have unanimously come to the same conclusion.

The 8th paragraph of the return of the common council is as follows:

"8th. We further certify and return that all the testimony and evidence taken on said hearing and at said trial of said charges cannot be returned for the reason that in addition to the witnesses being brought before the common council, and whose statements are contained in the stenographic record returned herewith as aforesaid, that in addition thereto, and as further testimony against said Robert E. Bolger, on Tuesday, the third day of April, 1906, the entire common council in a body visited all the different jobs of paving upon the Eastern and Western boulevards, the same being the paving jobs in controversy. That the said common council and the individual members thereof, having heard all the testimony, and being familiar with all the requirements, specifications and details of said work, carefully and personally examined into the same, their condition and the condition of each of said jobs, and into the matter of carrying out and executing said work, and took such measurements and depths as from time to time and place to place the said council saw fit. From such personal examination of the work and from such evidence as said council and the individual members thereof then and there saw, by being present and examining and viewing said work in detail, and which was apparent to said commissioner had he done his duty, the said common council was satisfied of the incompetency and unfitness of the said Robert E. Bolger, for his office as park and boulevard commissioner. That the said work was not up to the specifications, and said examination, with the other testimony in itself, sustained the charges that had been preferred against Robert

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E. Bolger, and satisfied defendants in certiorari of his gross neglect of duty, unfitness and incompetency, maladministration, and unlawful conduct in his office of commissioner of parks and boulevards. That said inspection, as aforesaid, was made on three days' notice, and at said examination and inspection, as aforesaid, the said Robert E. Bolger was represented by one of his counsel, viz., Mr. Edwin Henderson, who accompanied the said common council in said inspection, as aforesaid; and that it appears from said testimony and said inspection that there was legal and competent evidence introduced upon the trial of said charges to support said charges and to warrant and justify the passage of the removal hereinbefore set forth."

It is contended by counsel for plaintiff that, it appearing from the return that the common council based its determination upon its own view, such fact annuls and vitiates its determination. As to this point and the further point, that the council should have voted separately on each charge and specification thereunder, and upon the question of removal, we quote with approval the language of the circuit bench as follows:

"3. The next point raised by the counsel for the plaintiff and most strenuously argued is, that the action of the council was based, not upon the testimony in the case, but upon a view of the alleged bad work by the council itself. This view was made by the council in a body in the presence of counsel for the plaintiff, and without objection on the part of either the plaintiff or his counsel. The examination was made after testimony had been taken by the council for many days, and it may well be supposed that it was necessary for a full understanding of the testimony, much of which appears to have been technical in its character. We quite agree with the contention of counsel for the plaintiff that the common council could not substitute information received by a personal view of the alleged faulty work for testimony with regard to the same, or use such information so received as a basis of action in the absence of all competent testimony tending to establish the charges. But it is not apparent to us from the record that this was done, and we are quite of the opinion that it was clearly within the rights of the

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council to examine the work in order to have a better understanding of the testimony; and especially is this so when such examination was made in the presence of counsel for the plaintiff, and without objection from him. Emphasis is laid upon the remarks made by Alderman Heineman in explaining his vote. But it will be noted that he assigned his reasons for voting as he did, not alone to the effect of the view of the work upon his mind, but to the testimony regarding the same given before the council.

"4. Should the council have voted separately on each charge and specification thereunder, and upon the question of removal?

"The Supreme Court has said:

"'As the granting of a writ of certiorari is largely discretionary, we do not think it consistent with public policy to disturb the action of the bodies entrusted with managing local concerns, unless upon grounds which indicate probability that actual wrong has been done by the course taken. It is not intended by the law that such action shall be delayed by judicial interference where it can be avoided, and it is not the duty of such bodies to tie up their own hands by formalities which have no legal obligation.' *Gage* v. *Board of Sup'rs of Chippewa Co.*, 47 Mich. 170.

"Again:

"'While the proceeding for removal is quasi-judicial, and while it is well settled that the officer is entitled to notice of the charges, and that such charges must be sufficiently specific to apprise him of what he is to meet, yet the technical rules of pleading are not to be applied.' *Burt* v. *Board of Sup'rs of Iron Co.*, 108 Mich. 526.

"In the language of the resolution, the plaintiff is found guilty 'of the said several charges and specifications as aforesaid.' It must be presumed that each alderman who voted for the affirmative upon that resolution passed upon every one of the charges and specifications enumerated in the resolution, and upon the question of removal. It is obvious that those of the council who did not so determine voted in the negative, and there were ten of them."

The fact that the municipality was fully protected against financial loss by bonds; that the work had not been finally accepted by the commissioner; that the con-

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tractors were bound to make good all defects in work or materials, and that the commissioner, according to his testimony, intended to make an accurate final inspection of the completed work and to require it to conform in all respects to the contract, would not be so inconsistent with the charges of gross negligence as to invalidate the findings of the common council.

It was the duty of the commissioner to inspect the work as it proceeded, which was obviously the most opportune time for inspection. The bonds and the provisions of the contract did not dispense with the necessity for careful supervision and inspection of the work as it proceeded, but furnished an additional remedy in case, with proper inspection during its progress, the improvement was found in any respect imperfect.

If, acting upon competent evidence, the common council were satisfied that the commissioner's performance of his duties evidenced such gross negligence as to indicate that his further continuance in office would be a menace to the public, his removal would not be improper for the reason that, in the end, the city would suffer no financial loss. Moreover, as said by the circuit bench:

"It is insisted that negligence within the true intent of the law touching the removal for cause means such negligence as imports actual loss to the public. It is not clear to the minds of the court, assuming the charges to have been sustained by competent testimony, that there is no loss to the public. Simply because the contractors in question had given bonds for the protection of the public against any money loss, it does not necessarily follow that no loss would have been suffered. The inconvenience of the public during the period when necessary repairs or rebuilding would have to be done, a period in which, had the contract been performed according to its tenor, the public would have been entitled to the free and unobstructed use of the roadway, is to our minds an element of loss quite as important and worthy of consideration as a mere financial loss."

With the strength or weakness of the case against Mr. Bolger we have nothing to do; our inquiry is limited to

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ascertaining whether there was any competent evidence, however weak, tending to sustain the findings of the common council. We agree with the circuit bench that there was such evidence, and the judgment is affirmed.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

RICHARDI *v.* VILLAGE OF BELLAIRE.

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — WATERWORKS—NECESSITY FOR ESTIMATES.

   Where the common council of a village, organized under the general law, obtained from engineers estimates of the expense of installing and maintaining a waterworks system and improving the electric lighting plant belonging to the village, and, without official action upon the acceptance or adoption of the estimate, adopted a resolution calling a special election and submitting to the electors the question of borrowing a sum of money substantially less than the estimate furnished by the engineers, there was not a substantial compliance with section 2893, 1 Comp. Laws, and the action of the council and the election which followed were void.

2. SAME—BORROWING MONEY—POPULAR VOTE—WATERWORKS—MAINTENANCE.

   A submission to the electors of a village, organized under the general law, of a proposition to borrow a certain sum of money for the "construction and maintenance of waterworks," there being nothing to show what proportion was to be used for construction and how much for maintenance, was void, since the statute (sections 2890–2900, 1 Comp. Laws) does not authorize the borrowing of money for the maintenance of waterworks.

Appeal from Emmet; Shepherd, J. Submitted January 8, 1908. (Docket No. 13.) Decided July 3, 1908.

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Bill by Henry Richardi against the village of Bellaire, its president, clerk, and common council, to enjoin the borrowing of money for the establishment of a waterworks system. From a decree dismissing the bill, complainant appeals. Reversed, and decree entered for complainant.

Fitch R. Williams, for complainant.

Leavitt & Guile, for defendants.

MCALVAY, J. The village of Bellaire is incorporated under the general laws of the State. For the year A. D. 1905, its assessed valuation was $316,845; for the year A. D. 1906, $286,725. The complainant is a large taxpayer of said village. This action is brought to restrain the defendants from borrowing money alleged to be voted by the people at a special election held June 18, 1906. It is claimed that the proper proceedings were not had to authorize the proposed action. The defendants answered the bill of complaint and claimed that the action of the village authorities was regular, and that the bill of complaint ought to be dismissed. A hearing was had in open court. The circuit judge filed a written opinion, as follows:

"The bill filed in this cause seeks to enjoin the defendants from raising money by bonds to install waterworks, and to improve an electric light plant owned by the city. Complainant bases his claim for relief on several grounds; the following, only, being insisted upon in the argument:

"*First.* That there is no record of any estimate of the contemplated cost of the improvements.

"*Second.* That the instrument prepared by the engineers employed by the village council, and claimed to be an estimate, does not fill the requirement, because it places the estimate of the expense at a sum materially larger than the village is authorized by its charter to borrow.

"*Third.* That the amount sought to be raised is more than 5 per cent. (the statutory limit) of the last preceding tax roll.

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"1. I find that the alleged estimate was procured by action of the council of defendant, was in writing and on file in the village clerk's office at the time of the adoption of the resolution submitting to the electors the question of making the loan in question, which is a sufficient record of the fact of the existence of the estimate.

"2. The fact that the estimated cost of the improvements was more than the village was authorized to borrow may or may not have been a good reason for not adopting the resolution to bond, but did not divest the council of the power to borrow an amount less than the estimate.

"3. The amount sought to be raised was not in excess of 5 per cent. of the 1905 tax roll. The assessment for 1906 was materially less; but the roll for that year (1906) did not become a 'tax roll' until June 18th, the day of the election, and after the closing of the polls.

"In my opinion the roll of 1905, being the 'last preceding' one at the time of the action of the council, is the one which limits the power to bond. Therefore a decree may be made dismissing the bill, with costs."

The case is brought here by appeal; the complainant making the same claims here that he did in the court below.

The record shows that for a number of years the village owned and operated a municipal electric lighting plant, and a dam and water power, and was operating the same when this action was brought. It also shows that at the time of the commencement of this action, and for a number of years prior thereto, the village of Bellaire derived its water supply for fire protection and domestic use from a plant owned and operated by the Bellaire Water Supply Company, a corporation of which the complainant is the manager and principal owner; that the contract between the village and the last-named company was about to expire. On April 10, 1906, the common council of the village of Bellaire took action looking to the raising of the dam and increasing the efficiency of the electric lighting plant owned by said village, and at the same time took action looking to the construction and maintenance of a waterworks system for said village, by appointing a committee consisting of three of its members, together with

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the president of the village, "to ascertain and estimate the cost of raising the dam at the electric lighting plant of the village to increase the efficiency of said electric lighting plant and to increase the power at said plant to its full capacity."

It was further provided by the resolution appointing said committee "that said committee further estimate the expense and so far as practicable determine the cost of constructing and maintaining a suitable waterworks system for the village," and "that such committee take the preliminary steps to secure the services of a competent engineer to make all necessary surveys, plans, and specifications for such increase of power, and for the installation of a waterworks system." The committee conferred with the Riggs & Sherman Company, consulting engineers, of Toledo, Ohio, and on the 19th of April, 1906, a representative of that firm came to Bellaire, and with the committee looked over the ground and made certain measurements at the dam and water power. On April 23, 1906, the committee, by report of that date of record in the council proceedings, referred to the common council of said village an offer in writing made by said Riggs & Sherman Company to make surveys, plans, specifications, and estimates of cost of both such improvements at the dam and water power, and for a waterworks system for said village, for a certain consideration therein specified. Which written offer was accepted by the common council of said village by resolution of record in the council proceedings.

The Riggs & Sherman Company was notified of the acceptance by the common council of its said offer, and the sketch map, therein referred to, was sent by the clerk of the common council. On May 19, 1906, the said Riggs & Sherman Company sent and furnished the common council of said village itemized estimates of the expense of such proposed waterworks system, amounting in the aggregate to $23,940.55, and of the proposed improvements at the dam and water power, amounting to $5,700.

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Accompanying said estimates was a letter from the Riggs & Sherman Company showing wherein said estimates for a waterworks system could be modified and the expense thereby materially lessened. By the use of a water tower instead of a reservoir it was shown a saving of $1,200 or $1,300 would be effected; and by the use of different pipe it was shown a saving of $2,000 could be made. Said estimates and letters went into the official custody of said village clerk and remained a file in his office. The estimates were laid before the common council of said village and discussed prior to the adoption of the resolution calling for a special election to vote upon the proposition hereinafter mentioned.

On May 23, 1906, the common council of said village, by resolution of record in the council proceedings, submitted to vote of the electors of said village two distinct and separate propositions, as follows:

"Resolved, That a special election in and for the village of Bellaire is hereby ordered to be held at the common council room in said village on Monday, the 18th day of June, A. D. 1906, for the purpose of voting upon the following distinct and separate propositions, to wit:

"Proposition Number 1: To borrow the sum of $15,800 for the construction and maintenance of waterworks in said village of Bellaire.

"Proposition Number 2: To raise by loan the sum of $6,200 for necessary corporate purposes, to wit, for the purpose of raising and repairing the dam and enlarging the power house of the electric lighting plant now owned and operated by the village of Bellaire.

"The contents of the ballots on proposition number 1, to read: In favor of borrowing the sum of $15,800 for constructing and maintaining waterworks for the village of Bellaire.

"Yes ( )
"No ( )

"The contents of the ballots on proposition number 2, to read: In favor of raising by loan the sum of $6,200 for raising and repairing the dam and enlarging the power house of the electric lighting plant of the village of Bellaire.

"Yes ( )
"No ( )"

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The necessary notices were given, a special election was held and both propositions were carried by more than a two-thirds vote. The above is all that appears of record as to the estimates and the action taken in relation thereto. Was what was done a substantial compliance with the provisions of the statute? See 1 Comp. Laws, §§ 2890 to 2900.

The requirement of the statute that the village, before borrowing, appropriating, or spending money for the purpose of construction of water works, shall, by its council, cause to be made an estimate of the expense thereof, has not been complied with. The approximate estimate furnished by the engineers was tentative, and was for no fixed amount. It was accompanied by written instructions and suggestions whereby it could be reduced in amount, as the following statement clearly shows:

"It occurs to us that with the suggestions in this letter the council can use the estimate of figures in a way that will enable you to submit a proposition within the bonding limit."

No official action upon the acceptance or adoption of the estimate was ever had. This we consider necessary, for the reason that without such action, there is no official declaration of the amount required.

From this so-called estimate, no one can tell what amount the council has determined was required for such waterworks. In fact, the council has never determined the amount required to construct these waterworks, either by adopting an estimate, or by independent resolution. There is no indication in proposition number 1, submitted to the electors, as to what proportion was for construction, and how much was to be used for maintenance. The statute does not authorize money to be borrowed for maintenance of waterworks.

The section of the statute under consideration, i. e., section 2893, 1 Comp. Laws, reads in part as follows:

"Before any money shall be borrowed, appropriated,

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raised or expended for the purchase or construction of waterworks in any village, the council shall cause to be made an estimate of the expense thereof, and the question of raising the amount required for such purpose shall be submitted to the electors of the village, at its annual election, or at a special election called for that purpose by the council, as provided for in this act, and shall be determined as two-thirds of the electors voting at such election by ballot shall decide."

Under this section, the voter would have a right to rely upon the fact that $15,800 was the amount required. Nowhere in this record appears an answer to the important question, What was the amount required? Fifteen thousand eight hundred dollars was not that amount, nor is it claimed that $23,940.55, as the required amount, has ever been submitted to the people.

It is not necessary to discuss the other questions raised. The action of the council was void, as were also the election proceedings which followed. The decree should be reversed and a decree entered in favor of complainant, as prayed, with costs of both courts.

BLAIR, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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QUAY v. DULUTH, SOUTH SHORE & ATLANTIC RAILWAY CO.

1. JURY—EXCUSING JUROR FOR CAUSE—DISCRETION OF COURT.
   A trial judge may, in the exercise of his discretion, excuse a juror for cause at any time before the introduction of evidence.

2. SAME—HARMLESS ERROR.
   Error, if any, in excusing a juror after he had been sworn, is not prejudicial, where the cause was submitted to an impartial jury, since this court could not require the cause to be tried before the jury first sworn.

3. DAMAGES—LOSS OF PROFITS—FIRES—RAILROADS.
   The measure of damages for the destruction by fire, set by defendant railroad company's engine, of logs piled along its right of way for shipment to a mill to be manufactured into shingles, is the value of the logs plus the rental value of the mill during the period the owner lost its use through the burning of his logs; the element of loss of profits being too uncertain for submission to the jury.

4. RAILROADS—FIRES—NEGLIGENCE—DEFECTIVE SMOKESTACKS—QUESTIONS FOR JURY.
   Whether defendant railroad company's engine was properly equipped and managed so as to constitute a defense under the statute (section 6295, 2 Comp. Laws) to an action for negligent fire, *held*, under the evidence, to be a question for the jury.

Error to Mackinac; Shepherd, J. Submitted January 10, 1908. (Docket No. 31.) Decided July 3, 1908.

Case by Lafayette Quay, George W. Quay, and Edward S. Quay, copartners as D. Quay & Sons, against the Duluth, South Shore & Atlantic Railway Company for the negligent burning of certain logs. There was judgment for plaintiffs, and defendant brings error. Reversed.

Henry Hoffman (*A. E. Miller*, of counsel), for appellant.

Benjamin & Quay, for appellees.

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BLAIR, J. Plaintiffs instituted this suit to recover damages for the destruction by fire of about 300,000 feet of cedar logs alleged to have been caused by sparks from one of defendant's locomotives. The logs were piled along defendant's right of way for shipment over its road to St. Ignace, whence plaintiffs intended to have them towed to Cheboygan for manufacture into shingles at their shingle mill at that place, as defendant understood. The declaration alleged, and the evidence tended to prove, that, in consequence of the burning of said logs, "plaintiffs ran out of stock for their said shingle mill and were therefore compelled to close down their mill about a month before the usual closing time, thereby causing them to lose great profits which they otherwise would have made through the operation of said mill and the manufacture of said logs into shingles."

On the examination of the jury, Mr. Mulcrone, one of the panel, was asked upon his voir dire if he sold any meat to the defendant, to which question he replied: "Yes, I furnish some to their dining cars." A challenge for cause having been overruled and plaintiffs' peremptory challenges having been theretofore exhausted, the jury were sworn, and thereupon (it being Saturday) court adjourned to the ensuing Monday at 10 o'clock a. m. On the opening of court on Monday, and before any testimony was taken in the cause, plaintiffs' counsel announced that it had come to their attention that the juror Mulcrone had a contract with defendant, whereby he furnished to it about $400 worth of meats per month. Against defendant's objection and exception, the court permitted Mulcrone to be re-examined, whereupon he testified: That he had been selling meats to defendant for eight or ten years, and had furnished it some that day. "I furnish them daily for their dining cars on this route." That his bills ran from $300 to $600 a month. "I haven't got any signed contract. They merely buy from me. They didn't sign any contract." Thereupon plaintiffs' challenge for cause was allowed, and Mr. Mulcrone excused,

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to which ruling defendant's counsel excepted. The panel having been completed, the trial proceeded, resulting in a verdict for plaintiffs, and defendant has removed the record to this court for review upon writ of error, relying upon the following assignments of error:

"(1) Because of the error committed by the circuit judge in excusing, after the jury had been sworn to try said case, Patrick Mulcrone, one of said jurors, and completing said panel by calling other talesmen, and proceeding with the trial of the cause with this new jury.

"(2) Because of the error committed in admitting testimony against defendant's objection and exception, touching damages other than the value of the property burned, being for damages for losses alleged to have been suffered in the loss of profits that would have resulted in the manufacture of the timber, if same had not been burned.

"(3) Because the circuit judge refused the requests of the defendant to the jury, numbered 1 to 5 inclusive."

1. This point is without merit. As we said in *Scripps* v. *Reilly*, 38 Mich. 13:

"It is the aim and policy of the law to have a fair and impartial jury, and, to this end, it would be the clear duty of the court, up to the last minute, to permit counsel to further examine the jurors."

In accordance with the principle of that decision, we hold that the trial judge may exercise his discretion to excuse a juror for cause at any time before the introduction of evidence. This holding is supported by authority and is in harmony with the policy of the law to secure a trial by an impartial jury. 24 Cyc. p. 314, and cases cited.

Even if it should be held that the ruling of the court was erroneous, we could not correct the error, since we could not require the case to be tried before the jury first sworn. All that the defendant would secure by a reversal for this error would be the right to try the case before an impartial jury, and this it has already had. The error, therefore, would not be prejudicial.

2. The contention of counsel for defendant under this head, as stated in his brief, is as follows:

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"The testimony was inadmissible for two reasons: (*a*) Because plaintiffs were not entitled to profits they claimed they would have made in the manufacture of the shingle timber, if the same had not been burned, the proper measure of damages being the value of the timber burned at the time and place of burning. (*b*) Because the alleged profit, as appears from the testimony in this case, was too uncertain, speculative and remote to form any basis for recovery."

The testimony of plaintiff Lafayette Quay, which defendant objected to and moved to strike out, tended to show:

"That the logs were gotten out as part of the 1906 season stock to manufacture into shingles to keep their mill at Cheboygan running. That the mill started up about the 14th of April, 1906, and shut down about the first week in November, on account of having no more timber to run their mill; that if they had had timber they could have run along until Christmas; that they were unable to obtain other logs to replace those burned, although they had been in the market for logs all season; that logs are purchased a year ahead to stock a mill, and that it is very often impossible to obtain stock for a mill in July and August, as the logs are usually placed long before this time; that cedar shingle timber usually grows where it is difficult to lumber in the summer time and has to be lumbered and purchased in the winter time, as cedar is usually from swampy places and close to rivers that cannot be driven during the summer time, and the logs have to be driven in the spring when the water is high; that the only shingle timber he heard of after the fire was some that was brought to Cheboygan by Capt. Perue and which he desired to purchase but Perue would not sell, and, instead, contracted with plaintiffs to have his logs manufactured into shingles at plaintiffs' Cheboygan mill, and which they did so manufacture during the season of 1906; that it would have taken 30 or 35 days to have cut the logs burned into shingles at plaintiffs' mill, running days only, but, running the mill day and night, it would have taken them 18 to 20 days; that, if they had cut these logs into shingles, they would have been able to dispose of them, as they not only sold all the shingles they manufactured that season, but had demand and could have sold three times the amount of their cut; that it would have cost

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plaintiffs 75 cents per 1,000 or a little less to load the logs on cars at Allenville, $2 to freight logs from Allenville to St. Ignace; 25 cents a 1,000 to tow the logs from St. Ignace to Cheboygan; that there would not be any loss of logs in towing them from St. Ignace to Cheboygan at that time of year; that there are not many windstorms in July or August to bother; that they were in shelter at St. Ignace before leaving and would not go out in a storm; that never in their experience in towing logs between St. Ignace and Cheboygan did they lose any logs in the lake; that it costs 55 cents per 1,000 to manufacture the shingles at the mill, including loading them on cars. * * * I know what it costs to manufacture shingles at the mill by figuring it up a good many times—knowing what we cut and figuring the expenses. We figure it for one day. We usually figure it up at night whether we are in debt or not, and we figure it up by the week, and then, as we have pay day twice a month, we figure up the expenses of running the mill and that it costs us 55 cents per 1,000 to manufacture them—that includes putting them in the car. This includes the labor of the men employed at the mill and the incidental expenses of band iron, nails, and oil; but that it did not include his own services nor the bookkeeper's services or interest on the investment or taking into consideration any breakdowns. * * *

"*Q.* When you speak of 55 cents per 1,000, you speak of the manufacture of shingles when everything else is running, without any breakdowns or any break or in the way of strikes or any interruptions?

"*A.* No; that is what it costs to manufacture shingles —55 cents a thousand.

"*Q.* If you have a strike, it would cost you more?

"*A.* I don't know. We never had any."

In *Allis* v. *McLean*, 48 Mich. 428, it was held that for failure on the part of a manufacturer to furnish machinery known to be desired for the purpose of fitting out a mill, such failure resulting in an interruption of the business of the manufacturer and a consequent loss of profits, profits could not be recovered for the reason that the profits of running a sawmill are too uncertain, indefinite, and contingent. They depend on many circumstances, among which are capital, skill, supply of logs, supply and steadiness of labor; that one man may fail while another prospers, and

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the same man may fail at one time and prosper at another, although the prospective outlook seemed equally favorable at both times. This case was followed in *John Hutchinson Manfg. Co.* v. *Pinch*, 91 Mich. 156, although upon another point in the case—that is, as to whether rental value of a mill might be recovered under such circumstances—*Allis* v. *McLean* was overruled, but upon the main question, as to whether profits as such were too uncertain and speculative to be recovered, *Allis* v. *McLean* was approved. On the other hand, there is a line of cases beginning with *Leonard* v. *Beaudry*, 68 Mich. 312, and including *Fell* v. *Newberry*, 106 Mich. 542, and *Industrial Works* v. *Mitchell*, 114 Mich. 34, in which it has been held that profits are a proper measure of damages in any case where loss of profits results from the wrong of the defendant, and where such profits can be ascertained with reasonable certainty. In other words, the court has no hesitancy in awarding damages corresponding to profits, but that the only limitation in applying that rule is that they must first have been in contemplation of parties (in case of contract) and that they must not be uncertain. In *Leonard* v. *Beaudry* it was held that where there was a distinct contract to cut a certain amount of lumber at a certain price per thousand, and the owner of the mill had been deprived of the opportunity of performing the contract, the loss to him was the difference between what it would have cost him to perform the contract and the stipulated price, and that such damages were not too speculative. So in *Fell* v. *Newberry*, 106 Mich. 542, it was held that where the owner of timber agreed to furnish and stock a mill, although the amount was not agreed upon, yet that the capacity of the mill could be shown for the time agreed upon, and that the loss of profits in manufacturing such quantity would be recoverable. The same thing was held in *Barrett* v. *Veneer Works*, 110 Mich. 6. We are of the opinion that the proper measure of damages in this case, under our previous decisions, is the value of the logs destroyed plus

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the rental value of the mill during the period plaintiffs lost its use through the burning of their logs. It follows that the court erred in permitting the plaintiffs to recover the profits they might have made from working up their logs.

3. Defendant's requests 1 to 5, inclusive, required the court to instruct the jury to direct a verdict in favor of defendant, upon the ground that there was no evidence of negligence on the part of defendant; that the undisputed evidence showed that its locomotives were properly equipped; that their machinery, smoke-stacks and fire boxes were in good order; that the screens or nettings used on said engines were of a form, kind, and pattern as good as any that is known, and were suitable for the purpose for which they were used; and that the engines were properly managed at the time and place in question; making a conclusive defense under section 6295, 2 Comp. Laws. Without reciting the evidence, we content ourselves with saying that the evidence in this case was much stronger to take the case to the jury than in *Dolph* v. *Railway Co.*, 149 Mich. 278, in which case we held that there were questions of fact for the jury upon these questions.

The judgment is reversed, and new trial ordered.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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KNIGHTS OF COLUMBUS *v.* McINERNEY.

1. LIFE INSURANCE—BENEFICIAL ASSOCIATIONS—BENEFICIARIES—WHO ELIGIBLE.

   Under the charter of a beneficial association and the laws of Connecticut, the State of its domicile, benefits were payable only to some member of the immediate family of the member at the time of his death. An unmarried man became a member and accepted a certificate payable to his mother, provided that she was at the time of his death his lawful beneficiary under the charter, constitution, and laws of the order, and the laws of Connecticut. At the time of his death the member had a wife and children and his mother was not a member of his family. *Held*, that on the face of the contract, the mother was not entitled to the benefit.

2. COURTS—RULES OF DECISION—LAWS OF SISTER STATE—INTERPRETATION.

   An interpretation by the highest court of another State of the laws of that State with respect to the charter, laws, and contracts of a beneficial association organized there, is binding upon the courts of this State as to the construction of a similar contract which by its terms is subject to those laws.

3. LIFE INSURANCE—BENEFICIAL ASSOCIATIONS—BENEFICIARIES—PAYMENT OF ASSESSMENTS—EFFECT.

   The fact that a sister of a member of a beneficial association had been allowed to pay the assessments for several years, with the understanding and expectation on her part and that of the member's wife that his mother, the designated beneficiary, was the lawful beneficiary, whereas the widow and children were the legal beneficiaries, amounts only to payment under a mistake of fact, and does not entitle the mother to the benefit.

4. SAME—BENEFICIARIES—DESIGNATION OUT OF ORDER.

   That the association had authority "for special" reasons to accept a designation out of order, did not require it to pay the fund to the member's mother, the designated beneficiary, where the member designated her at a time when he had no family of his own and made no further designation; since on his death the right to the fund vested in his heirs and the association was powerless to change those rights by any action it might take in favor of another.

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5. RELEASE—LIFE INSURANCE—PROCEEDS OF POLICY—CONSIDERATION—NECESSITY.

That the widow of a member of a beneficial association, without consideration, and supposing that her husband's mother, the designated beneficiary, was a legal beneficiary, and at the solicitation of the secretary of the association, whose officers hesitated to pay the mother, executed to the association a release of any claim to the benefit, could not affect the right of the widow and her children to the fund, where the association, which interpleaded the parties, did not act upon the release, made no claim under it, and retained the fund in its hands for payment to those lawfully entitled to it.

Cross appeals from Bay; Collins, J. Submitted February 24, 1908. (Docket No. 137.) Decided July 13, 1908.

Bill of interpleader by the Knights of Columbus against Margaret E. McInerney and Louise B. McInerney, personally, and as guardian ad litem of Paul B. and Ruth M. McInerney, minors, to determine title to the proceeds of a benefit certificate. From the decree rendered, defendants appeal. Reversed, and decree entered for defendant Louise.

De Vere Hall, for defendant Margaret McInerney.

William J. Doyle and *Gilbert W. Hand*, for defendant Louise B. McInerney.

HOOKER, J. The complainant is a nonresident fraternal beneficiary association, organized under the laws of Connecticut. On April 16, 1899, Cornelius J. McInerney was a member, and received a benefit certificate of that date for $1,000 payable, according to its terms, to Margaret E. McInerney, his mother, *provided that she was at the time of his death his lawful beneficiary, under the charter, constitution, and laws of said order, and the laws of the State of Connecticut.* At the time said certificate was issued, the member was an unmarried man residing with his parents. Louise B. McInerney is the widow, and Paul B. and Ruth M. McIn-

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erney are the minor children, of Cornelius J. McInerney, deceased. A dispute having arisen over the right to the fund due upon this certificate, complainant filed a bill of interpleader and this controversy is between the defendants thereto. The learned circuit judge made a decree dividing the fund remaining, after payment of costs, between the mother, Margaret McInerney, and the children, in equal shares, and all of the defendants have appealed.

The mother bases her claim upon the fact that she was designated as beneficiary when the certificate was taken, and no other beneficiary has since been designated; the fact that for several years her daughter has paid the assessments, and the further fact that a release by Louise B. McInerney to the complainant of all her claims to the fund was given. Louise B. McInerney, on behalf of herself and her children as heirs of the deceased, claims that in accordance with the laws of the order, the laws of Connecticut, and the terms of the contract itself, Margaret McInerney is not entitled to the fund, not having been a member of the family of her son at the time of his death, and that, according to the charter and laws of the order, she and her children are entitled to it.

The certificate provides:

"The Knights of Columbus hereby promises and binds itself to pay to Margaret E. McInerney, provided such person is the lawful beneficiary of said member at the time of his death, a sum not exceeding $1,000, in accordance with and under the provisions of the laws of the Knights of Columbus."

The charter in force during the life of the certificate provides the order in which beneficiaries shall be designated, as follows:

"Which said beneficiaries shall be specified only in the following order, to wit:

"(*a*) To such person or persons of the immediate family of said member as by him designated.

"(*b*) To such person or persons in default of such family of the blood relatives of such member as by him designated.

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"(c) In default of any designation by said member or out of the order named, except by the permission of the board of directors or their successors for cause shown, then such aid shall be rendered by said corporation, to such family or relatives who are heirs at law of such member, in the manner above arranged."

The following laws of the order are applicable to this controversy:

"SEC. 38. The board of directors shall have full power and authority. * * *

"4. To determine to whom a death benefit shall be paid when non-beneficiary is designated; and, should a member in good standing die without having named and having had recorded in the books of the national secretary the name of any person or persons to whom the sum shall be paid, then to determine to whom said sum shall be paid, provided, however, that in all cases the beneficiaries shall not be in conflict with the provisions of the charter of the Knights of Columbus.

"SEC. 73. Upon the death of any member legally elected and in good standing at the time of his demise, the order of the Knights of Columbus shall pay to the beneficiary, person or persons named by the deceased prior to his death, and entered upon the books of the national secretary as the beneficiary, the person or persons to whom the death benefit shall be paid in case of his demise, such sum as the deceased may have been insured for, subject to the provisions of the preceding sections, and shall take duplicate receipts therefor, one of which the national treasurer shall retain and the other forward to the national secretary. * * *

"SEC. 78. Should a member in good standing die without having named and having had recorded in the books of the national secretary the name of any person or persons to whom said sum should be paid, or the designation of the beneficiary is contrary to the provisions of the charter, or the beneficiary designated has died, then the board of directors, upon the advice of the national advocate of the order, shall determine to whom said sum shall be paid; provided, however, that in all cases the beneficiaries shall not be in conflict with the provisions of the charter of the Knights of Columbus. * * *

"SEC. 80. A member desiring to change his beneficiary

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shall give written notice and surrender his benefit certificate to the financial secretary of his council, directing that a new certificate be issued to him, payable to such beneficiary or beneficiaries as such member may designate in accordance with the laws of the order.

"SEC. 82. No officer, employé or agent of the order, or any council thereof, has the power, right or authority to waive any of the conditions upon which benefit certificates are issued, or to change, vary or waive any of the provisions of the constitution or laws. Each and every benefit certificate is issued only upon the conditions stated in and subject to the constitution and laws of the order."

The evident intent of the law of Connecticut is to secure to the immediate family of the beneficiary, at the time of his death, the benefit of financial aid generally necessary at such times. It endeavors to put it out of the power of the member to deprive his family of such aid, by means of a designation of others, by fixing the order of designation, and making payment contingent upon the continuance of the relation, and this design is emphasized by the contract, which contains a proviso that, to be entitled to payment, the proper relation must exist at the time of the death of the member. Plainly, on the face of the contract, the mother is not entitled to payment. A similar contract was construed in *Knights of Columbus* v. *Rowe*, 70 Conn. 545, a case closely resembling the present case, and it was held that the parent was not entitled to the fund, and that the widow and the infant were. This case interpreted the law of the State of Connecticut, which required the complainant to make contracts according to its terms, and we think where, as in this instance, the contract in terms is made subject to the law, i. e., charter, the construction of such law by the highest court of the State is conclusive here and we are bound to follow it, because it is the agreement of the parties, if for no other reason. The case of *Larkin* v. *Knights of Columbus*, 188 Mass. 22, is another similar case, where the same view hereinbefore expressed was entertained.

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Some reasons are suggested for departing from the rule of the cases cited.

Payment of Assessment. It is claimed that a sister of deceased has been allowed to pay the assessment for some years, with the understanding and expectation on her part and that of the widow that the mother was a lawful beneficiary. There is nothing to show that such payment was more than this, and the widow is not, and certainly the infants are not, chargeable with any duplicity in the case. The sister simply paid money under a mistake of fact. It does not entitle her mother to the property of the widow and orphans, and the alleged equities in her favor are not conspicuously greater than those of her daughter-in-law and grandchildren, whose necessities are quite likely to be as urgent as her own. The record shows that her husband was not well off. But it is not a case in which necessity or apparent equity can be controlling. The question is one of legal rights.

Counsel assert that it was the duty of the complainant to pay the fund to the mother, they having authority, "for special" reasons, to accept a designation out of the order. There was no designation by the member after the first, and during his life the complainant did not act upon the subject. It was not asked to do so, and had it been, it could not have been compelled to do so. It is enough to say it did not. When the member died, the right to this fund vested in his heirs, and the complainant was powerless to change those rights by any action it might take in favor of another.

Release by Widow. The widow, without consideration, and supposing that the mother was a legal beneficiary, and at the solicitation of the secretary of the company, whose officers hesitated to pay to the mother, executed to it a release of any claim to the fund. We do not see that the release affects the question. The mother certainly secured no rights under it and lost nothing by it, and the complainant did not act upon it, and makes no claim under it. The fund is still in the hands of the complain-

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ant, and it is willing to pay it to those lawfully entitled to it. We are of the opinion that the entire fund should be paid to the widow, one-third in her own right as heir and the remainder as guardian for the two children, each of them being entitled to half of the remaining two-thirds. Defendant Louise, in her own right and as guardian, is entitled to costs of both courts against defendant Margaret McInerney. The decree of the circuit court will be modified in accordance with this opinion, a new decree to be entered in this court.

GRANT, C. J., and MOORE, CARPENTER, and MCALVAY, JJ., concurred.

ANDERSON CARRIAGE CO. *v.* PUNGS.

1. APPEAL AND ERROR—DECISIONS ON FORMER APPEALS—LAW OF THE CASE.

   A determination on a former appeal that plaintiff made a case for the jury, approved upon a second appeal, will be followed upon a third appeal, the record being in legal effect the same.

2. SAME—DECISION—RETRIAL—LAW OF CASE.

   Where it is contended that a ruling of this court on a former appeal as to the admissibility of certain evidence was used upon the retrial as an opportunity to introduce immaterial and damaging evidence, but an examination of the record satisfies the court that the trial court kept within the ruling, no error appears.

3. TRIAL—INSTRUCTIONS—MODIFICATION—PROPRIETY.

   A modification of a requested instruction, to the effect that the question presented by the instruction is an academic one, in view of the issues and evidence, is not prejudicial error, where the record warrants the charge as given, and the claims of the parties are clearly stated in other portions of the charge.

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4. SAME—CHARGE AS A WHOLE.

An assignment of error to a segregated portion of a charge will not be sustained on the ground that the agreement described therein did not constitute the agreement declared upon, where it is apparent from a reading of the entire paragraph that the court referred to the agreement relied upon.

Error to Wayne; Hosmer, J. Submitted February 28, 1908. (Docket No. 20.) Decided July 13, 1908.

Assumpsit by the Anderson Carriage Company against William A. Pungs for the breach of a contract to convey certain patents. There was judgment for plaintiff, and defendant brings error. Affirmed.

Dwight C. Rexford, for appellant.

Russel, Campbell, Bulkley & Ledyard (*Harrison Geer*, of counsel), for appellee.

MCALVAY, J. This is an action in assumpsit brought by plaintiff against defendant to recover damages for an alleged breach of contract between them. This is the third time the case has been before this court upon writs of error. The case is reported in 134 Mich. 474, and 140 Mich. 437. The statement of facts made the first time the case was considered by this court, supplemented by a further statement made the second time the case was before us, relieves the court from making any statement of such facts at this time. For such statement, reference is had to the volumes cited above.

Defendant, under the writ of error by which the case is brought here, has assigned numerous errors. The case is one which involved controverted questions of fact; the principal one of which was whether an oral agreement, as claimed by plaintiff, was made between the parties in January, 1898. The questions of law involved in the case have been settled in the former decisions, and there would appear to be no new questions before us except such as are incidental to every trial relating to the matter of

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admitting or rejecting evidence and the charge of the court.

In his brief, the attorney for defendant states:

"This third record now here shows a materially different state of facts from what appeared in either of the two previous records. These differences will be particularly mentioned later on. They relate to the evidence as to the alleged agreement, and as to damages; also to various matters permitted * * * to be shown as his (defendant's) motive for making the alleged agreement, and also to differences in the court's charge to the jury."

In this opinion we will consider the case presented on this record by defendant, and his claims, in the order above stated, as near as may be, and we must compare the voluminous records in the three cases and determine whether these claims are well grounded.

1. It was decided upon the first review of the case, and approved upon the second review, that defendant's contention that a verdict should have been directed for him was not tenable. The same contention is again made, and supported by the same arguments as on the two former hearings, upon practically the same record. The court adheres to its former decision upon the question.

2. What has been said as to the previous contentions of defendant regarding the proof as to the contract may also be said upon the question of damages. Upon this question no material difference appears in the present record. The same arguments were urged on the first review. The question was passed upon at that time and is not an open one.

3. Upon the second review, a question was before the court upon the admission of evidence relative to representations made by defendant to plaintiff "in regard to his business which it was proposed to contribute to the consolidation." This evidence was excluded by the trial court. This court held in that case that the court was in error, that evidence bearing upon that proposition was material, not as bearing upon defendant's liability, but upon the probability of the agreement having been made.

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The case was reversed for that reason. The trial court, following the indication given by this court, upon the last trial admitted such evidence. It is strenuously urged by defendant that the ruling of this court was used by plaintiff as an opportunity to get into the case a large amount of immaterial and damaging evidence. An examination of the evidence complained of satisfies us that the trial court kept within the ruling of this court upon that proposition, and that no error was committed.

It is claimed that portions of the charge of the court are not the same as approved by this court upon former hearings. The claim of defendant as to the agreement plaintiff relies upon has been, that, as proved, it was an agreement with the individuals Anderson and Locke, and not with the company. This court has held in a former decision of the case that this was a question of fact for the jury. A request to that effect was presented by defendant and given, with the added statement:

"I think so far as this case is concerned that request is a proper request, but to a certain extent it is rather an academic question, because there is no contention in this case that the promise was made otherwise than for the benefit of the corporation on the part of the plaintiff; and, so far as the defendant is concerned, there is an absolute denial that any promise was made, so that in no case could there be anything more, I think—anything further or other than a purely academic question."

This is complained of, as informing the jury that it was a matter of no importance in the case, and that they need not give it serious attention. The court had charged clearly that the promise, *as claimed* by plaintiff, must be proved by a preponderance of evidence, and that it must have been a promise to plaintiff company and not a promise to these persons as individuals. In view of the state of the testimony, what the court added, which is quoted above, was to the effect, that, under the evidence, if any promise was proved, it was a promise to the company, for the reason stated in the charge. This we do not think

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was error, certainly no prejudicial error. The record warranted this charge.

Much testimony was put in the case bearing upon the motive for the promise it was claimed defendant had made. The charge of the court started out with such a statement and carefully called the attention of the jury to this testimony, and confined its purpose to that question alone. He then stated plaintiff's claim in the case as to the promise of defendant which was relied upon, to which portion of the charge there is no objection made. The court then proceeded to state what defendant had requested to charge relative to the fact that it was not possible for Anderson to close up the business at that time, as he had stated to defendant, and that there was no legal ground for such interference. The court then said:

"Be that as as it may, if Anderson had offered or proposed at the time, or Mr. Locke, or one or both of them, to withdraw their services from the corporation, and to go out and found a new corporation, or to make an effort to do that thing, I think that in itself, if they refrained from so doing, by reason of any promise which Mr. Pungs might have made in consideration of their remaining, would form a good consideration for such promise, if such promise were made."

So much of this portion of the charge as is just quoted verbatim is excepted to and error assigned thereon, on the ground that this did not constitute the agreement declared upon. A portion of a paragraph of the charge is segregated and claimed to be erroneous.

This court has said too often to be under the necessity of repeating, that the charge must be taken as a whole and dealt with in fairness. Had the entire paragraph been quoted, it would have been apparent to any fair-minded person that the court referred to the agreement relied upon. The quotation concludes at the end of a clause, in the middle of a sentence. The sentence proceeds,

"And whether there was a promise made at all, be-

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cause it is strenuously denied by Mr. Pungs that any promise was made of the character which plaintiff claims, and as it is asserted on behalf of plaintiff, becomes, gentlemen of the jury, a question * * * solely for your determination."

This charge was not erroneous. The other questions raised upon the charge necessary to refer to have already been disposed of, as stated above, on the former hearings.

Exceptions were taken to statements of counsel upon opening the case, and on the argument. We have examined the statements made, and hold them not to have been prejudicial. The record discloses no error.

The judgment is affirmed.

GRANT, C. J., and HOOKER, MOORE, and CARPENTER, JJ., concurred.

BOUSSNEUR v. CITY OF DETROIT.

153 585
158 151

1. MUNICIPAL CORPORATIONS—OPENING STREETS—CONDEMNATION PROCEEDINGS—IRREGULARITIES—EFFECT—SPECIAL ASSESSMENTS.
Where such proceedings to open a street were taken under chapter 90, 1 Comp. Laws, as resulted in a determination of the necessity of the improvement by one jury, and an assessment of the value of the property and of the benefits by another, and the award of the second jury was accepted by the owners of the property and paid by the city, there was a waiver by the only parties directly interested of the irregularity of submitting the questions to two juries, and persons whose only relation to the proceedings was their liability for benefits could not enjoin the collection of the special assessments because of the irregularity complained of. GRANT, C. J., and BLAIR, J., dissenting.

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2. SAME—AWARD—ACCEPTANCE—TIME.

That the award was not accepted by the landowners, nor the money paid by the city, until after the bill was filed in this case, did not affect the right of the parties to waive the irregularities, nor to show such acceptance as evidence of waiver, since if the parties had a right to waive the irregularities, complainants could not deprive them of it by filing a bill.

3. SAME—ASSESSMENTS—OMISSION OF PROPERTY—RELIEF.

Whether property within a special assessment district belonging to a church, and omitted from the assessment on the theory that it was exempt, should have been included, cannot be decided on a bill to enjoin the collection of the special assessment, since if the property should have been included the only relief available to complainants would be a reduction of their assessments, and to entitle them to that they should tender their proportionate share of the taxes and point out the extent of their reduction.

Appeal from Wayne; Mandell, J. Submitted April 16, 1908. (Docket No. 109.) Reargued June 2, 1908. Decided July 13, 1908.

Bill by John N. Boussneur against the city of Detroit and Thomas M. Lucking, receiver of taxes, to enjoin the collection of an assessment. Horace H. Dickinson and others intervened as parties complainant praying the same relief. From a decree for complainants, defendants appeal. Reversed, and bill dismissed.

Keena, Lightner & Oxtoby, for complainants.

Denton Guinness (*Timothy E. Tarsney*, of counsel), for defendants.

In 1902 proceedings were instituted in the recorder's court for the city of Detroit for the opening of Hancock avenue from Fourteenth avenue to Grand River avenue. The jury duly impaneled in that case determined that it was necessary to have this avenue opened and valued the property to be taken at $18,356.05. The judge of the recorder's court before whom the proceedings were had confirmed that portion of the verdict finding the necessity

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and set aside that portion of the verdict valuing the property. Subsequently, in 1906, a second jury was called for the purpose of assessing the value of said property. They assessed the value at $13,150. These proceedings were confirmed by the common council of the city of Detroit, and that body, acting in pursuance of the authority given it by the charter, directed a portion of the amount found by said jury—two-thirds—to be assessed against property in the locality of the proposed improvement specially benefited. A certain piece of land belonging to St. Leo's parish, which would otherwise have been included, was omitted from the assessment district because it was used for church purposes. Complainant and the intervening complainants are the owners whose property is made subject to said local assessment. They seek an injunction prohibiting the enforcement of said assessment upon two grounds:

(1) That the recorder's court lost jurisdiction by having one jury determine the question of necessity and another assess the value of the property taken.

(2) That the common council had no right to leave out of the assessment district the property of the Catholic church above mentioned.

Defendants answered and the case was heard in the lower court on pleadings and testimony taken in open court. It appeared by this testimony that the owners whose property was taken for the proposed improvement accepted the compensation awarded them by the second jury. The learned trial judge gave complainant and the intervening complainants a decree. Defendants appeal.

CARPENTER, J. (*after stating the facts*). 1. The first question for our consideration is that raised by the contention of complainants that the recorder's court had no jurisdiction because the questions of necessity and valuation of property were determined by two different juries. It is by no means clear that either the Constitution or statutes of this State forbid the practice com-

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plained of. In *City of Detroit* v. *Beecher*, 75 Mich. 454 (4 L. R. A. 813), in an appeal from proceedings instituted for the purpose of opening a street, this court affirmed the judgment with the exception of the valuation of three parcels of land owned by appellant. As to this, it directed an appraisement by another jury. Thus the questions of necessity and the valuation of the property were in that case, by the judgment of this court, determined by two different juries. Assuming, however, but not deciding, that such practice is forbidden, it by no means follows that complainant and the intervening complainants can raise the objection. The parties to the condemnation proceedings, viz., the city on the one hand and those whose property is taken on the other, do not raise it. On the contrary they acquiesced in the proceeding. They treated the judgment as a valid and binding judgment. The city paid the award and the property holders accepted it. This affords conclusive evidence that any departure from proper practice was consented to by the parties directly interested in the proceedings. They had a right to consent to this departure and the judgment rendered under these circumstances would be just as binding upon them as if the proceedings had been regular in every particular. The property was therefore taken for street purposes just as effectually as it possibly could be taken under any condemnation proceedings that might be instituted.

Complainant and the intervening complainants are specially benefited by the taking of this property and they are therefore taxed to pay a portion of its cost. They are not affected by any irregularities in the taking of that property which did not affect those whose property was taken. As the proceedings were sufficiently regular to take the property, they are sufficiently regular to be the basis of proceedings to raise a tax to be used in paying for it. Complainant and the intervening complainants cannot escape taxation by reason of the non-prejudicial irregularities of which they complain. This is settled by our

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decision in *Borgman* v. *City of Detroit*, 102 Mich. 261. There, in a street opening case, by consent of all parties to the proceedings, a jury of 11 instead of 12 determined the question of necessity and assessed the value of the property taken. This was clearly a departure from the method provided by the Constitution and statutes. We held that, as this irregularity was waived by the parties to the proceeding, it was not open to objection by those whose property was assessed for the improvement, and a bill filed by them to restrain the enforcement of such an assessment was dismissed. See, also, *Scotten* v. *City of Detroit*, 106 Mich. 564; *Brown* v. *City of Saginaw*, 107 Mich. 643. I am therefore of the opinion that complainants' right to relief cannot be based upon the ground that the proceedings in the recorder's court were fatally defective.

On the reargument of this case—which took place after the preparation of this opinion—the point was made by complainants' counsel that the payment and acceptance of the award cannot be considered, since that took place after the institution of this suit. There might be force in this contention if this opinion proceeded upon the ground that the payment of the award was what passed the title to the condemned property. But the opinion does not proceed upon that ground. It proceeds upon the ground that the condemnation proceedings were valid and effectual because any departure from proper practice was consented to by all the parties interested therein. The payment and acceptance of the award is used merely as evidence of that consent, and I think it might be said it only corroborates other evidence contained in the record. If, however, we assume the payment and acceptance of the award to be the only evidence of consent found in this record, we affirm our right to use it as such evidence, and to hold it conclusive in this case. Under this assumption, at the time this suit was instituted—for it was instituted before the lapse of the time given the city to pay the award—the parties to the proceeding had a right either to raise objec-

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tions or to waive all irregularities occurring therein. Surely complainants by commencing this suit could not deprive these parties of their right to waive said irregularities. They had just as much right to waive them after this suit was commenced as before, and such waiver cured all irregularities in the proceedings, and, under the reasoning of this opinion, made them valid and effectual for all purposes.

2. The effect of exempting the property of St. Leo's church property. The city authorities exempted this property because they thought they were required to do so by section 3825 and subd. 5 of section 3830, 1 Comp. Laws. Whether or not they were right in this, we are not called upon to determine. If they were wrong it would not entitle complainant and the intervening complainants to relief in this case. For in that case their property should still be assessed for a smaller amount, and, therefore, all they could claim would be a reduction in the amount of their taxes. They make no such claim. To entitle them to equitable relief in such a case, they should have tendered their proportionate share of the taxes and pointed out the extent of their reduction. This they did not do. They claim relief upon no such ground, and we cannot give it to them. See *Grand Rapids, etc., R. Co.* v. *City of Grand Rapids*, 137 Mich. 596, 597.

If I am right in the foregoing views, the decree of the circuit court should be reversed and a decree entered in this court dismissing complainants' bill, with costs of both courts.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred with CARPENTER, J. MCALVAY, J., concurred in the result.

GRANT, C. J. (*dissenting*). In 1902, proceedings were instituted by the proper authorities of the city of Detroit for opening Hancock avenue from Fourteenth avenue to Grand River avenue. A jury was impaneled and on September 13, 1902, they rendered a verdict finding that the

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necessity existed, and assessing damages to those whose lands were taken for the street. The court confirmed the verdict, finding that the necessity existed for opening the street, but set it aside as to the assessment of the damages. No further proceedings were taken until in January, 1906, when another jury was impaneled to assess damages. The jury duly rendered a verdict which was afterwards, on January 19, 1906, confirmed by the court.

On May 29, 1906, the common council, by appropriate resolution, fixed and determined the property benefited by said opening and assessed upon said property $8,766.67, and that the balance of said award should be paid by the city. On June 26th an assessment roll was presented to the council and duly confirmed. A protest was afterwards entered before the common council against the city's action, which was denied. Complainant, whose land was assessed, promptly thereafter filed this bill in chancery to set aside the verdict and judgment of the recorder's court on the ground that it was absolutely void. The case was heard upon pleadings and proofs taken in open court, and a decree entered for the complainant.

1. These condemnation proceedings were taken under chapter 90, 1 Comp. Laws. Sections 3398 and 3399 are the ones before us for construction. Section 3398 provides that the jury shall be sworn to determine two facts, —(1) whether a public necessity for the improvement exists; and (2) if they so find, to ascertain and award the just compensation to the owners of the land.

Section 3399 reads as follows:

"The jury shall determine in their verdict the necessity for the proposed improvement and for taking such private property for the use or benefit of the public for the proposed improvement and in case they find such necessity exists they shall award to the owners of such property and others interested therein such compensation therefor as they shall deem just."

Can two juries be summoned to determine the two questions provided in the statute? To hold that the statute so provides would do violence to plain language. The stat-

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ute provides for one jury to determine two questions. If the necessity is found to exist, the jury must determine the value of the land then, and not at a time in the past or future. Years afterwards the land may have appreciated or depreciated in value. As the learned circuit judge well said:

"If the public authorities, having obtained a verdict as to a necessity, can wait three years before having an assessment of value, they can as well wait thirty years."

What is a necessity at one time may not be a necessity years afterwards. The statute contemplates one proceeding at one and the same time to determine both questions. Trials cannot thus be conducted in piecemeal. If there is error upon the trial the entire case must be retried. It follows that the proceedings are absolutely void.

The case of *City of Detroit* v. *Beecher*, 75 Mich. 454 (4 L. R. A. 813), affords, in my judgment, no justification for the proceedings in this. I have examined the briefs in that case and find that no such question was raised. The statute had been fully complied with in submitting both questions, namely, the necessity and the value, to the same jury. The statute was attacked as unconstitutional, and numerous objections were raised to the proceedings. It was also alleged as error on the part of the court to instruct the jury that they could award only nominal damages for three pieces of land, which formed a private alley. This was the only error in the case, and it was affirmed in all other respects and a new appraisement ordered as to those parcels. For aught that appears in the record, briefs, or opinion of the court, that course may have been assented to by the respondents. Be that as it may, I do not think it can be taken as authority for holding that one jury may be summoned to ascertain the necessity, and, years afterwards, when conditions in cities are quite sure to have changed, another may be summoned to determine the value of the land taken.

2. It is, however, urged that the validity of the record-

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er's court proceedings cannot be attacked in a collateral chancery proceeding, and that the complainant's remedy was by appearing before the reviewing authorities to have his assessment corrected. Complainant was not a party to the condemnation proceedings, and there was nothing then to indicate that he ever would become interested therein. To deprive him of some opportunity to appear before some tribunal would be to deprive him of his property without due process of law. The board of review is not clothed with authority to set aside the judgment and decrees of courts of record. It is not an appellate court to sit in judgment upon the proceedings of the constitutional courts of the State. They have jurisdiction to correct assessments and review the action of the assessors. There their jurisdiction begins and ends. The judgment of the recorder's court was void upon its face. It is not a mere irregularity which may be ignored where the taxpayer has suffered no injustice. Complainant acted with due promptness in applying to the court to prevent a cloud upon his title. A chancery court has jurisdiction in such cases. *Steckert* v. *City of East Saginaw*, 22 Mich. 104; *Twiss* v. *City of Port Huron*, 63 Mich. 528; *Beider Manfg. Co.* v. *City of Muskegon*, 63 Mich. 44.

I do not think that it is settled by the case of *Borgman* v. *City of Detroit*, 102 Mich. 261, that a proceeding void upon its face is conclusive upon the taxpayers who were not parties to the litigation. The sole question in that case was whether the parties in the condemnation proceedings might waive a jury of 12 men and proceed with a jury of 11. In all other respects the statute was fully complied with, and the same jury determined both questions.

In *Scotten* v. *City of Detroit*, 106 Mich. 564, the only error alleged was that the mayor did not sign the resolution adopted by the common council,—a technical error, and one which did not at all affect the merits of the case.

The decree should be affirmed, with costs.

BLAIR, J., concurred with GRANT, C. J.

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MINER *v.* FARMERS' MUTUAL FIRE INSURANCE CO. OF MANISTEE, BENZIE AND MASON COUNTIES.

1. FIRE INSURANCE — MUTUAL INSURANCE COMPANIES — NOTICE OF ASSESSMENTS — "ISSUING."
   A provision in the charter of a mutual fire insurance company requiring the payment of assessments within 30 days after the "issuing" of the notice of assessment, means within 30 days after the giving or delivery of such notice. MONTGOMERY, HOOKER, and CARPENTER, JJ., dissenting.

2. SAME — SUFFICIENCY OF NOTICE.
   Where the charter of a mutual fire insurance company provides the notice of assessment that shall be given to members, a member can only be put in default by the notice provided for, and his knowledge otherwise acquired is not sufficient.

3. SAME — MAILING NOTICE — QUESTION FOR JURY.
   In an action on a policy issued by a mutual fire insurance company on which plaintiff had failed to pay an assessment, testimony tending to show that the notice of assessment required by defendant's charter had not been received was some evidence that the notice was not mailed, and raised an issue of fact which should have been submitted to the jury.

Error to Benzie; Chittenden, J. Submitted April 16, 1908. (Docket No. 112.) Decided July 13, 1908.

Assumpsit by James J. Miner against the Farmers' Mutual Fire Insurance Company of Manistee, Benzie and Mason Counties on a policy of insurance. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Reversed.

D. G. F. Warner, for appellant.

Pratt & Davis, for appellee.

BLAIR, J. This is an action on a policy issued by defendant to plaintiff, a member of the company, covering property which was destroyed by fire on the 8th day of

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November, 1905. Defendant pleaded the general issue with notice—

"That at the time of the loss mentioned in plaintiff's declaration, said policy of insurance was without force, in that said plaintiff was in default in the payment of his dues and assessments, and had neglected to pay such dues and assessments within thirty days after the notice of the same had been issued as he was required to do by the constitution of defendant association."

Sections 18, 19, 20 of the defendant's charter, which were printed on the policy, were as follows:

"SECTION 18. Whenever the board of directors shall order an assessment in accordance with section 17 of this charter, the secretary shall execute the same, which shall be signed by a majority of the board of directors and secretary and placed on file in said secretary's office and such assessment so signed shall be evidence in courts and all other places that the sums assessed are due and payable to the company from the person against whom the same are respectively made. Every member shall be equitably and ratably assessed in proportion to the amount of his or her insurance as stated and fixed in the severable agreements and schedules of insurance.

"SEC. 19. When such assessment shall have been completed according to section 18 of the charter, the secretary shall prepare a written or printed circular, a copy of which he shall direct to each member of the company to his or her last known post-office address, setting forth to such members the amount of such member's assessment, and each member shall pay his or her assessment to the president or his receiver within thirty days after the issuing of said notice, and in default thereof his or her insurance shall be suspended and shall henceforth have no claim against said company for losses sustained until his or her assessment is paid. The assessment roll shall be evidence in all courts of law that the sum assessed is due the company and payable by the person assessed.

"SEC. 20. If any member of the company shall neglect or refuse for the space of thirty days after the date of such circular as provided for in section 19 to pay the assessment therein made, the secretary may proceed forthwith to collect the same by due process of law, adding 25 per centum to the amount of said assessment of each said

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delinquents, and such delinquents shall be liable for all demands due from him or her to said company, and no insurance policy shall be binding until the actual payment of the premiums."

An assessment was made on the members in August, 1905. An employé of the secretary testified that it was her duty to send out notices of the assessments, and for that purpose she had the assessment book containing, among other names, that of plaintiff:

"I made out all of the assessments and Mrs. Griffin folded them and put them in the envelopes and Mr. Griffin and I carried them to the post office all at once; these were the notices of assessment. The list covered the entire list in this book. The notices were partly written and partly printed. I took the number of the policy from the big book, put it on the notice, also on the envelope. The number 1947 was the number of Mr. Miner's policy. I placed it on the envelope, also on the notice of assessment. The envelopes had a return notice upon them, if not called for in, return to John Griffin, Scottville, Michigan, that was on the upper left-hand corner. I wrote the name of the party on the assessment and on the envelope. I did it in relation to all these parties whose names appear upon the assessment. * * * The assessment was completed and the notices mailed the first week of September, 1905."

In response to a question by the court, witness said:

"I remember Mr. Miner's name on the book is all, but I don't remember sending a notice to him in particular."

Plaintiff testified:

"Up to the time of the fire I had paid all the assessments brought to my notice. I paid one assessment after the fire on November 9. I didn't know it was due until I went over to see Mr. Fitts. I think I heard about it the day before the house burned, I was helping my brother and he told me that there had been an assessment made. That is the only way I knew, the day before the fire. The day after the fire I went to Mr. Fitts and he told me the amount of the assessment and that is the first I knew what the assessment was. I then paid the assessment. I had not received any notice of any assessment that I had

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not paid. * * * I am positive that I got no written notice of the assessment prior to my fire."

Steve Miner, a brother of plaintiff, testified to a conversation with plaintiff:

"My time book shows that it is the day we finished digging potatoes, which was the 7th day of November. We were working together and I asked him if he had paid his assessment to the Farmers' Mutual Fire Insurance Co., and he told me that he hadn't paid it. He says it is just a little past due, isn't it? It is due the 1st of November. I told him no, it is due the 1st of October. He told me he hadn't received any notice."

At the conclusion of the testimony, the court directed a verdict for defendant, stating his reasons therefor as follows:

"Gentlemen of the jury, in this case, under the ruling of the court in regard to this notice, the court held that this notice must come home to Mr. Miner. On reviewing the testimony more carefully, I find that one of the plaintiff's witnesses testified that Mr. Miner, in conversation with him, on the 7th day of November, told him that he understood that the payment was — but I will read from the testimony of Stephen Miner: 'He said it is just a little past due, isn't it? It is due the 1st of November.' That would be conclusive proof, as long as the testimony is not disputed, that this plaintiff new that this assessment was past due and therefore he was in default. And while he may not have received the notice from the company as testified to by him and as we have every reason to believe he did not from his testimony, nevertheless he had other notice and the court holds that he did and that he was in default and your verdict, gentlemen, will be no cause of action."

Plaintiff brings the record to this court for review, alleging, among other assignments of error, that:

"The court erred in refusing and not submitting the case to the jury on its merits under a proper instruction from the court."

In support of this assignment of error, counsel for plaintiff contends that the only notice of assessment sufficient

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to work a suspension or forfeiture of his policy is the written notice provided for in the charter, and that such notice must be not only made out, but mailed to, and received by, the plaintiff to be effective.

Although the evidence indicates that the assessments during the six years plaintiff had been a member had been uniformly made prior to, and notice thereof mailed during, the first week in September, section 17 of the charter provided for making them "from time to time as may be necessary," and the provisions as to notice are to be construed with this in mind.

The purpose of the notice is to inform the member that the assessing officers, who may act at any time, have acted at a certain time, and that his obligation to pay the particular assessment has arisen. The verb, "to issue," includes among its meanings, "to deliver by authority." 17 Am. & Eng. Enc. Law (2d Ed.), p. 539; 23 Cyc. p. 358; *Thomas* v. *Abbott*, 105 Mich. 687.

Construing section 18 with reference to its manifest purpose of notifying the member of the happening of an indefinite event, I think the provision "within 30 days after the issuing of said notice" should be read as meaning within 30 days after the giving or delivery of said notice.

While the provisions of section 19 imply that the notice is to be mailed to the members, it is worthy of note that in fixing the beginning of the period for payment the provision is not that the member shall pay within 30 days after the mailing of said notice, which would have been the obviously natural expression, if such was the intention.

Plaintiff could only be put in default by the notice provided for in the charter, and his knowledge otherwise acquired was not sufficient for that purpose. *Castner* v. *Insurance Co.*, 50 Mich. 273; *Miner* v. *Benefit Ass'n*, 63 Mich. 338; *Warner* v. *Life Ass'n*, 100 Mich. 157; *Shelden* v. *Accident Ass'n*, 122 Mich. 403.

I am also of the opinion that the testimony that the

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notice was not received was some evidence that the notice was not mailed, and raised an issue of fact which should have been submitted to the jury.

Judgment reversed, and new trial granted.

GRANT, C. J., and OSTRANDER, MOORE, and MCALVAY, JJ., concurred with BLAIR, J.

MONTGOMERY, J. The facts are sufficiently stated in the opinion of Mr. Justice BLAIR, and the provisions of the company's charter relating to assessments are there set out. It seems to be conceded that there was evidence that the notice provided for by section 19 of the charter was in fact prepared and mailed to the post-office address of the plaintiff. But it also appeared that there was evidence tending to show that the plaintiff never in fact received the notice mailed, and the question is whether, in such a case, the suspension of plaintiff's policy became effective after the lapse of the regular time from the service made of the notice, or whether it is required that, before there can be any suspension of the policy, the notice must actually have been received by the insured. To sustain the view that such notice must actually be received, four cases are cited: *Castner* v. *Insurance Co.*, 50 Mich. 273; *Miner* v. *Benefit Ass'n*, 63 Mich. 338; *Warner* v. *Life Ass'n*, 100 Mich. 157; *Shelden* v. *Accident Ass'n*, 122 Mich. 403. All these cases are clearly distinguishable from the present.

In *Castner's Case*, the charter provided that the member was to be *notified* by the secretary or otherwise, either by circular or verbal notice. It was held that, in view of the consequences to flow from this notification, it should be strictly construed, and that actual receipt of the notice was what was intended. It was said by the court:

"The provision is not that notice or information shall be mailed or sent or forwarded. The members are to be 'notified,' that is, informed; to have made known to them the fact of the assessment."

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In the present case, however, the method of service of notice is distinctly pointed out, to wit, a written or printed circular directed to each member of the company to his or her last known post-office address, and the provision is that each member shall pay his or her assessment to the president or his receiver within 30 days after the issuing of said notice.

Miner v. *Benefit Ass'n* turned upon sufficiency of the notice in *form*. The *Warner Case* was similar in all respects to the *Miner Case*.

In *Shelden's Case*, it was held that, under an article of the association which reads:

"Any member failing to pay his assessment or dues within thirty days after having been *notified* shall forfeit all his right to benefits. Mailing a notice to his post-office address as shown by the books of the association shall constitute such notification."

the payment was made within time. The facts were that the notice was mailed from Des Moines, Iowa, on the 29th of August and reached the place of residence of assured on the 1st day of September. The 30 days would not have expired until midnight of October 1st if the date at which the notice would in due course reach the assured was taken as the date of notification, and, if this were the proper date, the payment was made within time. The contention of the plaintiff was that the 30 days allowed for payment meant 30 days after he had actually received the notice, or 30 days after notice mailed to him would reach him in the ordinary course of the mails, and not that he should have only 30 days after the mailing of the notice. It was held that the payment on October 1st was in time after the notice was received. It was recognized as the correct rule that where service is the principal thing, and it is provided in the charter or by-laws that service may be by mail, then, that so depositing the paper addressed to a member will be sufficient notice.

The case of *Ross* v. *Insurance Co.*, 83 Iowa, 586, was cited with approval. In that case, a provision of the char-

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ter that "such notice may be served either personally or by registered letter addressed to the assured at his post-office address named in or on the policy," was construed, and it was held that the service was complete, and that the 30 days for payment began to run as soon as the letter was mailed as provided by law. The provision for forfeiture in the case was that "no policy of insurance shall be suspended for nonpayment of such amount until thirty days after such notice has been served."

It is not easy to distinguish that case from the present, which provides precisely what the secretary shall do in making service, and then provides that if payment is not made within 30 days from the issuing of said notice, the insurance shall be suspended. There is no other provision contained in the charter for issuing a notice except that of mailing the same, and the only notification which the charter provides for is the notification by this means.

It would seem that the case is distinguishable from any of those relied upon in the opinion of Mr. Justice BLAIR, that the service was complete upon the mailing. I agree that the plaintiff's testimony to the effect that the notice was never received was sufficient, under the circumstances of this case, to present a question of fact for the jury.

HOOKER and CARPENTER, JJ., concurred with MONTGOMERY, J.

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WALSH *v.* COLBY.

1. APPEAL AND ERROR — REVIEW — EXTENT — INTERLOCUTORY ORDERS.

   An appeal from a final order confirming a commissioner's corrected report of sale in chancery foreclosure proceedings, and ordering the execution of a new deed for the purpose of correcting a clerical error in the previous one, brings up the order vacating the order nisi confirming the original report, and all intermediate proceedings.

2. COURTS—RECORDS—CORRECTION—POWERS.

   Authority to correct purely clerical errors in their records is inherent in courts of general jurisdiction.

3. MORTGAGES—FORECLOSURE—SALE—REPORT — DEED — CLERICAL ERRORS—CORRECTION.

   Where, in a chancery foreclosure, the commissoner's report of sale and deed by reason of a clerical error fails to correctly describe the property, the description being correct in all proceedings prior to the report, the court has authority, upon due petition and notice, to vacate the order nisi confirming the report, and to correct the subsequent proceedings.

4. SAME—SALE—SEPARATE PARCELS—PRESUMPTIONS.

   Where a decree for foreclosure of a mortgage upon several adjoining lots was drawn in conformity with the statute (section 528, 1 Comp. Laws), it will be presumed that the commissioner making the sale under the decree followed its mandate, and there being no showing on exceptions to the report of sale that this was not done, or that the property could be sold in parcels without injury to the interests of the parties, objections to the confirmation of the report on the ground that the property should have been sold in parcels are untenable.

5. SAME—COMMISSIONER'S DEED—CORRECTION—FILING.

   Where a commissioner's deed, executed in chancery foreclosure proceedings, was duly filed with the register of deeds within the time provided by law, an objection to the execution of a new deed, correcting a clerical error in the previous one, apparent on the face of the record, on the ground that it cannot be filed within 20 days after the sale as provided by law, is not well taken, the sale not being disturbed, the time for redemption not being lengthened or shortened, and defendant making no showing of injury.

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Appeal from Wayne; Hosmer, J. Submitted April 17, 1908. (Docket No. 117.) Decided July 13, 1908.

Bill by John H. Walsh, trustee, against Sheridan J. Colby and others to foreclose certain mortgages: On petition of complainant to correct a clerical error in the commissioner's report of sale. From a decree for petitioner, defendant Colby appeals. Affirmed.

Shaw, Warren, Cady & Oakes, for complainant.

Jasper C. Gates, for appellant.

MCALVAY, J. Upon a bill filed by complainant to foreclose certain mortgages in the Wayne circuit court, in chancery, a decree was granted in his favor June 16, 1902. This decree was affirmed by this court as to defendant and appellant Colby. *Walsh* v. *Robinson*, 135 Mich. 16–22.

This decree ordered the premises described in the mortgages to be sold in the usual manner. The sale was made by Samuel L. May, circuit court commissioner, on March 29, 1906. His report was filed March 31, 1906, and September 19, 1906, an order nisi was entered confirming this report. In this report of the commissioner and in his deed a clerical error was made in describing the property sold. The correct description, as given in the mortgages, the decree, and notices of sale, is:

"All and singular * * * lots numbered consecutively from seventy-four (74) to ninety-three (93) both inclusive."

The error consisted in inserting in such description the number "seventy-nine (79)" instead of the first number "seventy-four (74)."

The complainant, who was the purchaser at the sale, discovering this error, filed his petition in the cause, together with an affidavit and notice of hearing, praying that the order nisi confirming the commissioner's report of sale be vacated for the purpose of allowing the correc-

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tion of said clerical error in the description. On the hearing of this petition, notice of which was given to all parties interested, defendant Colby appeared and contested. The court made an order granting the petition and correcting the error, on November 22, 1906. From this order defendant Colby appealed to this court. This appeal was dismissed January 4, 1907, on the ground that the order was not a final one. On February 8, 1907, Commissioner May filed another report of sale correcting the error above described. This report was filed nunc pro tunc, by order of the court, as of March 31, 1906, which was the date of the first report. An order nisi for the confirmation of such report of sale was made and entered and within eight days the defendant filed exceptions to such report, which were overruled by the court upon a hearing, and on January 9, 1908, an order to that effect was entered, said report being ratified and confirmed and the commissioner ordered to prepare a new deed for the purpose of correcting the description in the first deed and canceling the same. Defendant Colby, who is the only defendant interested in these proceedings, and who since the decree first named has been in possession and received the rents from said premises, has appealed from this last order and decree of January 9, 1908, including in his claim an appeal also from the former order of November 22, 1906.

The final order appealed from is so closely connected with the order of November 22, 1906, that an appeal from it brings all of the proceedings which led up to said final order before the court for consideration.

Defendant urges that through the operation of the order nisi the sale had become final and conclusive, and that the court possessed no power to disturb it. He relies upon the provisions of Chancery Rule 19*b* and decisions of this court relative to it. It seems to us that defendant has misconceived what was sought to be done by complainant. The decree of the court in the foreclosure case was not to be disturbed, nor the sale of the property described

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in that decree and actually sold under it. A clerical error (not disputed by this defendant) had occurred in the report of the sale, and also in the deed, in the number of a lot in the description, an error which was apparent from the face of the record. The application to correct this error was in fact not to disturb the decree and proceedings under it, but to make the record state the actual facts and conform with and speak the truth. For this purpose a petition was filed with supporting affidavit showing the facts, a hearing and a judicial determination in which this defendant participated was had, and the prayer of the petition granted. It was not contended at that time, and is not contended now, that the record as it now stands does not speak the truth.

The cases defendant cites in support of his contention are not in point. He refers us to no case, and in our investigation we have been able to find none, in which the right of a court to correct a purely clerical error in its records is disputed or denied. The authority to do so has been recognized as inherent in courts of general jurisdiction. 17 Enc. Pl. & Prac. p. 912 et seq., and notes. In the notes to this reference, citations are made from the Federal court and nearly all of the State courts in support of this proposition. This court has recognized and affirmed this doctrine. *Jerome* v. *Seymour*, Walk. Ch. (Mich.) 359; *Bates* v. *Garrison*, Harr. Ch. (Mich.) 221; *Emery* v. *Whitwell*, 6 Mich. 474; *Souvais* v. *Leavitt*, 53 Mich. 577.

The court had ample authority to make this order of November 22d, and the proceedings to do so were regular.

Defendant contends that the court erred in confirming the report and sale for the reason that the 20 lots were not sold separately but as one parcel, contrary to section 528, 1 Comp. Laws.

The decree was drawn in conformity with the statute, and the sale was made under the decree. The presumption is that the commissioner followed its mandate. No showing was made on the hearing of the exceptions that

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this was not done, or that the premises could be sold in parcels without injury to the interests of the parties. Complainant's brief states that the commissioner, "first offered the property in parcels, and, receiving no bid, offered and sold the same in entirety." This is not contradicted or challenged as it would have been had it been false. The statute was intended to require a sale to be made in such manner as would realize most to the parties interested. The sale as made conformed with the statutory provisions.

It is further contended that the order of January 9, 1908, is void because of the requirement of law that the deed on such sale must be filed with the register of deeds within 20 days after the sale and indorsed when the same shall become operative. The record shows that the first deed was duly filed within the time prescribed by law. The records in the cause showed that the premises actually sold were the premises described in the mortgage and the decree. The clerical error in the description contained in the report of sale and the deed was apparent upon the face of the record. This second deed recites that it is given for the purpose of correcting the former deed. The sale has not been disturbed. The time for redemption has not been extended or shortened. Defendant Colby makes no showing that he has been in any manner injured. In fact, from the record it appears that the delay in finally terminating this litigation is not chargeable to complainant, and that defendant Colby has profited by such delay.

The circuit court was not in error in overruling the exceptions of defendant Colby and in ratifying and confirming the commissioner's corrected report of sale hereinbefore mentioned and described, and in ordering the commissioner to make, execute, and file a proper deed.

The decree of the circuit court is affirmed, with costs.

GRANT, C. J., and BLAIR, MONTGOMERY, and CARPENTER, JJ., concurred.

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ARNOLD v. WHITE.

1. SALES—WARRANTY—BREACH—FORM OF REMEDY.
   For a breach of warranty of title to personal property, recovery may be had either in case or assumpsit, case being preferable where the breach has occasioned damages in addition to loss of the property.

2. SAME—PLEADING—AMENDMENTS—PROPRIETY—NEW CAUSE OF ACTION.
   Where the declaration, in an action on the case for false warranty of title to personal property sold, claimed damages actual and consequential, the allowance of an amendment counting on an oral agreement made some time after the sale, by which defendant agreed to make good to plaintiff any loss he might sustain by allowing a mortgagee to take the property, was improper, as introducing into an action sounding in tort a cause of action upon which recovery could be had only in assumpsit.

Error to Lenawee; Chester, J. Submitted May 4, 1908. (Docket No. 84.) Decided July 13, 1908.

Case by Edward B. Arnold against Elmer J. White for a breach of warranty in the sale of certain horses. There was judgment for plaintiff and defendant brings error. Reversed.

John L. O'Mealey and *Bird & Sampson*, for appellant.

Smith, Baldwin & Alexander, for appellee.

MCALVAY, J. Plaintiff brought suit in an action on the case for damages for a breach of warranty in the sale of a team of horses and set of double harness purchased by plaintiff from defendant in March, 1905. The declaration filed in the case, omitting the formal entitling, was as follows:

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"Edward B. Arnold, plaintiff herein, by Smith, Baldwin & Alexander, his attorneys, complain of Elmer J. White, the defendant herein, of a plea of trespass on the case. Suit having been commenced by summons.

"For that whereas: on to wit, the 15th day of March, A. D. 1905, at the said county, in consideration that the plaintiff, at the request of the defendant, would buy of the defendant a certain span or team of horses, one a grey gelding of the age of six years, the other a brown mare of the age of ten years, and a certain double harness with brass trimmings all for a certain price, $200, to be paid by the plantiff to the defendant, he, the defendant, undertook and then and there represented, warranted and promised plaintiff that the said horses and harness were free and clear of all claims, liens, mortgages and incumbrances of every name and description, and were the sole and absolute property of the plaintiff.

"And plaintiff avers that he relied upon said promise, agreement and representation and was induced thereby to purchase and did buy and purchase the said horses and harness, and did pay to defendant then and there said sum of money.

"Yet, the said defendant, disregarding his said representation, promise and warranty, fraudulently deceived and defrauded plaintiff in that said horses and harness were not free from all mortgages, incumbrances, claims and liens of every description, and said horses were mortgaged and said harness was mortgaged, and there were liens and incumbrances upon said property, and said property was not the sole and absolute property of the said defendant, and said mortgages, incumbrances and liens were equal to and in excess of the value of said property and of the amount so paid by plaintiff, to wit, $200. All of which was contrary to the said defendant's warranties, representations, promises and undertakings; and by reason of such incumbrances, mortgages, liens and claims plaintiff has been wholly deprived of said property and the use thereof.

"Further avers that on to wit, the 19th day of August, 1905, said horses were taken from him under chattel mortgage and by virtue of a lien and incumbrance thereon, so that said plaintiff has wholly lost said horses and the use thereof from said time on.

"Further avers that he bought said horses for use upon a farm which he was working and that for said purpose said horses were valuable to him, and the use valuable to

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him. That had said horses been free and clear from all incumbrances, as represented by defendant, they would have been worth to him and all others a large sum, to wit, the sum of $300, and their use for the balance of the season would have been worth to him a large sum, to wit, $200.

"Further avers that by reason of being deprived of the use of said horses he has been unable to carry on his business without material damage and injury to him and for the want of such horses has suffered large damages for the want of the use thereof, to wit, in the amount of $200.

"Also avers that he has been put to large cost and expense in time and money in attempting to learn the facts as to said incumbrances upon said horses and property and in the investigation of his rights, to wit, the sum of $50.

"Further avers that said defendant well knew at the time he made said representations that the same were untrue and that said property was incumbered for full value thereof.

"And plaintiff avers that by reason of the said fraudulent promises and representations of the defendant he has suffered large damage, in all to the amount of $500, whereby a cause of action hath accrued to the plaintiff to have and recover in an action on the case, against the defendant, his damages, as aforesaid, in all to the sum of $500 and therefore he brings suit."

The plea was the general issue with notice, to the effect that the mortgage under which the team was taken was void and of no effect and was no lien, and that, if plaintiff carelessly permitted the horses to be taken from his possession and out of the State, the defendant could not be charged with any loss or damage resulting therefrom. The substance of the pleadings is given because of an amendment to the declaration allowed by the court upon the trial against the objection of defendant.

The facts necessary to be stated are, that this property was purchased in Lyons, Ohio, by Adelbert Wilbur from one A. R. Chandler, August 23, 1904, and, to secure the payment of the purchase price, Wilbur gave Chandler a chattel mortgage upon this and other property, which

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mortgage was duly filed where the mortgagor lived. About September 1, 1904, Wilbur brought the property into Michigan, and sold it to defendant for cash, warranting his title. White had no notice or knowledge of this mortgage. White retained and worked the horses until March following, when he sold them for $200 to plaintiff, in good faith warranting his title. Neither party to this suit had notice or knowledge of this mortgage until August 19, 1905, when the mortgagee came from Ohio and claimed the property under it. The mortgage was never filed in Michigan. Both plaintiff and defendant were good-faith purchasers for a valuable consideration without notice. The mortgagee first went to defendant, and with him went to plaintiff, demanded the horses, and, after some delay, by consent of plaintiff, took the horses away with him, and during the night crossed the State line into Ohio with them. What occurred at that interview between these three parties is in dispute. The plaintiff's claim is that defendant advised him to surrender the horses to the mortgagee in order to save costs and expenses, and that he agreed if plaintiff did so to make good any loss and damage he might sustain; that, relying on this agreement, he surrendered the horses to Chandler. It also appears that he consulted his attorney, who advised him to the same effect, and that he could look to defendant for damages. Defendant denies that this agreement was made. During the trial of the case, these facts appearing, plaintiff asked leave to amend his declaration so as to set forth this claimed promise made at the time the horses were taken away from plaintiff. This amendment was granted over defendant's objection that it was stating a new and different cause of action. The case was tried and submitted to the jury solely upon the question as to whether this promise was made. The record shows that the attorneys for both parties and the court all agreed that the lien of this mortgage was of no force and effect in Michigan as against this property in the hands of this plaintiff, a bona fide holder. The question

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is whether the amendment allowed by the court stated a new and different cause of action from that set forth in the declaration.

Plaintiff could have brought his action either in trespass on the case or in assumpsit. The pleader elected to bring an action sounding in tort. The declaration is in trespass on the case for false warranty, for which damages, actual and consequential, are claimed. *Carter* v. *Glass*, 44 Mich. 154, and cases cited.

The course taken in this case is indicated as the preferable one, where the breach of warranty has occasioned damages in addition to the loss of the property. 30 Am. & Eng. Enc. Law (2d Ed.), p. 189.

The amendment allowed by the court, and upon which recovery was had, was upon a state of facts occurring six months after the warranty, upon a parol agreement entirely different from the original warranty, and upon which recovery could be had only in assumpsit. This court has held repeatedly that an amendment which changes the form of action from one sounding in tort to assumpsit, or vice versa, is not allowable. *People* v. *Wayne Circuit Judge*, 13 Mich. 206, and cases cited in note; *Doyle* v. *Pelton*, 134 Mich. 398. The amendment should not have been allowed.

The judgment is reversed, and a new trial ordered.

OSTRANDER, HOOKER, MOORE, and CARPENTER, JJ., concurred.

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PEOPLE *v.* NORTH.

1. INTOXICATING LIQUORS—OFFENSES—MALT LIQUOR—WHAT CONSTITUTES.

   Engaging in the business of selling a malt liquor containing about two per cent. of alcohol without having paid the tax constitutes a violation of sections 5379, 5380, 2 Comp. Laws. Per HOOKER, J., GRANT, C. J., and MONTGOMERY, J.

2. CRIMINAL LAW—RIGHT TO JURY TRIAL—CONSTITUTIONAL LAW—DIRECTION OF VERDICT—COERCION.

   Though the trial court in a criminal case may inform the jury that, under the evidence, they should render a verdict of guilty, he may not compel them to render such a verdict; and an instruction that "you should find a verdict of guilty as charged, without leaving your seats, and the clerk will take the verdict," violates the constitutional right of trial by jury. HOOKER, J., GRANT, C. J., and MONTGOMERY, J., dissenting.

Exceptions before judgment from Ingham; Wisner, J., presiding. Submitted May 7, 1908. (Docket No. 87.) Decided July 13, 1908.

George North was convicted of violating the liquor law. Reversed.

L. B. Gardner and *Richard Raudabaugh*, for appellant.

Walter S. Foster, Prosecuting Attorney, for the people.

HOOKER, J. The defendant was convicted of being engaged in the business of unlawfully selling malt, brewed, vinous, and fermented liquors, at retail, without having paid the tax required by law. The testimony was undisputed. At its conclusion the learned circuit judge said to the jury:

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"In a case where the facts are undisputed and sufficient of them are undisputed to make a case in favor of the people, then it is the duty of the court to tell the jury so, and to ask them to find a verdict in accordance with that fact. * * * Now, as I understand the law, gentlemen, the sale of that mixture is a violation of it, and the respondent himself having testified that he knew what it was, having testified that he knew that it contained some alcohol, that he must answer to the law for these sales, it appearing there is no testimony that he made more than one sale, furnished three glasses at the request of the officer, three glasses at the request of somebody else, making two sales, and making enough, under the law, as I understand it, to constitute him a dealer or a person engaged in the business. * * * I think it is my duty, and I instruct you that you should find a verdict against this respondent of guilty as charged, without leaving your seats, and the clerk will take the verdict."

Two questions are raised: *First*, whether the sale of malt liquor containing about two per cent. of alcohol was within the statute; *second*, whether it was error to direct the jury to find a verdict of guilty without leaving their seats. Sections 5379 and 5380, 2 Comp. Laws, justify the conclusion of the circuit judge upon the first question, and while the question was not discussed in *People* v. *Wilcox*, 152 Mich. 39, it was necessarily involved in that case. The charge of the court was not erroneous, being sustained by former adjudications cited in *People* v. *Gardner*, 143 Mich. 104, and *People* v. *Neal*, 143 Mich. 271. The former case distinguished the case of *People* v. *Collison*, 85 Mich. 105. See, also, *People* v. *Elmer*, 109 Mich. 493; *People* v. *Schottey*, 116 Mich. 1.

It is suggested that this record shows that the jury were not permitted to render a verdict of not guilty. If that is true, there was error, and the case should be reversed, but that is not to be presumed; it must appear from the record. We have quoted what was said by the learned circuit judge. He did not say to the jury, "You must render a verdict." On the contrary, he said by implication, in the first paragraph, that it was his duty to tell the jury

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that the undisputed proof made a case for the people and to ask them to find a verdict in accordance with that fact. He explained the situation at length in the second paragraph, and in the third he said: "I instruct you that you *should* find a verdict against this respondent of guilty as charged, without leaving your seats." The vice in this instruction, if there is vice in it, consists of the direction that it was their duty to find a verdict of guilty "without leaving your seats." It is no unusual thing for a jury to render a verdict, even in criminal cases, without leaving their seats, and in the absence of some indicated unwillingness to follow the instructions (which were clearly justified by the proof), there is no reason for thinking any juror was coerced into an unwilling verdict, and to reverse this case upon this ground is to overturn the conviction on a technicality. The cases of *People* v. *Warren*, 122 Mich. 504, and *People* v. *Remus*, 135 Mich. 632, 633, are relied on as condemning the practice followed in this cause. It must be admitted that as to the former there was a clear case of coercion of the jury into the rendition of a verdict against their convictions. In charging the jury that it was their duty to render a verdict of guilty, and sending them out to deliberate, the trial judge followed a practice which has been repeatedly sustained. But they returned into court manifestly unwilling to comply, and what occurred there conclusively shows that the verdict was the result of subsequent emphatic statements by the judge that they had no legal right to disregard his instructions. The entire court concurred in holding this to be error. We say, in substance, in that case, that it is settled in this State that a judge may direct a verdict of guilty, but may not compel it; a proposition the latter part of which has never been questioned in any of the cases decided in Michigan.

In *People* v. *Remus*, supra, the trial judge directed a verdict, and, after being out all night, the jury returned into court, and said that they were unable to agree, when the court said:

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"Gentlemen of the jury, it is your duty to return a verdict of guilty in this case. Now you will return to your room, and you will come in, under these instructions, and bring in a verdict of guilty."

This they then did and the court denied the demand of defendant's counsel that the jury be polled. That this was error is apparent, and we so held, and the language used may be reasonably construed as applicable merely to such a case as was then made, and not necessarily applicable to a case where indications of coercion are wanting.

I assume that in all cases of misdemeanor it is proper to direct a verdict of guilty upon admitted facts or where the offense is conclusively proved by uncontradicted testimony. If this is so, this case differs from the many where directed verdicts of guilty have been sustained, only in the fact that the judge told the jury that it was their duty to render such a verdict "without leaving your seats." We should not assume that this was any more coercive than as though he had omitted the direction as to leaving their seats, and they had at once, and without leaving their seats, conferred together and rendered such a verdict. Neither should we assume that they did not so confer together, before rendering the verdict and agree, nor that the clerk in taking the verdict omitted to take it in the manner required by law and in accordance with the form books, viz., "Gentlemen, have you agreed upon a verdict?" "What is your verdict?" "Listen to your verdict as recorded. You do say upon your oaths," etc. Had there been a deviation from this, it should have been made to appear in the bill of exceptions as it was in *People* v. *Collison*, 85 Mich. 107, and not so appearing we will not assume any deviation from the forms of law, especially in a substantial particular, and in face of the decision in the *Collison Case*, supra, with which the trial judge was doubtless familiar. Error is not to be presumed even in a criminal case.

In the case of *People* v. *Neumann*, 85 Mich. 98, it is inferable that the jury did not leave the court-room, yet

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the judgment was affirmed. Mr. Justice MORSE concluded his opinion in that case as follows:

"But in this State, where a judge has directed a verdict of guilty, and the jury have followed such direction and the facts are admitted or undisputed, and the only question is one of law, applied to such facts, a new trial will not be granted, if the judge was right in his application of the law. No injustice can be done the accused in such case, as it is not to be presumed that a jury will find in opposition to the law from mere whim, caprice, or prejudice, although they may have the right to do so.

"In this ruling we do not intend to encourage the practice of directing a verdict against the accused in criminal cases. In all such cases the jury should be permitted to retire to the jury room, and there deliberate, and the trial judge should content himself by stating the law as applied to the facts, and with an admonition to the jury of their plain duty in the premises.

"The conviction in this case is affirmed."

It immediately preceded the *Collison Case*, both cases being submitted and decided on the same days. The *Neumann Case* does not go the length of saying expressly that a verdict of guilty may, or that it may not, be directed. The former is clearly implied, however, by the affirmation of the judgment, and it has been expressly so held since, as it had been before. *People* v. *Richmond*, 59 Mich. 573; *People* v. *Hawkins*, 106 Mich. 479; *People* v. *Neal*, 143 Mich. 271; *People* v. *Gardner*, 143 Mich. 104, 116.

We find no error, and the judgment should be affirmed.

GRANT, C. J., and MONTGOMERY, J., concurred with HOOKER, J.

CARPENTER, J. The facts in this case are stated in the opinion of Justice HOOKER. I think there should be added, however, at the conclusion of his quotation from the charge of the court, this:

"Now, gentlemen, if you want to lodge exceptions before sentence, I will give you the opportunity to do so, that you may go to the Supreme Court to see whether I am right or not."

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This addition serves to indicate, what perhaps might otherwise clearly appear, that the charge was not intended to give the jury any responsibility respecting the rendition of the verdict. Nor do I understand that the jury actually did render a verdict. I infer that the clerk took their verdict as a mere matter of form. I find it impossible to reconcile this practice with the rule laid down in *People* v. *Warren*, 122 Mich. 504, followed by *People* v. *Remus*, 135 Mich. 629–634. I think that from *People* v. *Warren*, supra, and the cases there cited, it may be said that a trial court may inform a jury in a criminal case that they should render a verdict of guilty, but he cannot compel them to render such a verdict. I think that in this case they were compelled to render such a verdict, and that for that reason we must set aside the conviction.

BLAIR, OSTRANDER, MOORE, and MCALVAY, JJ., concurred with CARPENTER, J.

PEOPLE *v.* WHITE.

1. BURGLARY—BREAKING—WHAT CONSTITUTES.
   If any force at all is necessary to effect an entrance into a building, through any place of ingress, usual or unusual, whether open, partly open, or closed, such entrance is a breaking sufficient in law to constitute burglary if the other elements of the offense are present.

2. SAME—RAISING WINDOW.
   Raising the sash of a window, not shut down close, and held down by its weight only, far enough to admit respondent's body, constitutes a sufficient breaking to render the subsequent entry burglarious.

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Exceptions before judgment from Clinton; Searl, J. Submitted May 7, 1908. (Docket No. 126.) Decided July 13, 1908.

Edwin L. White was convicted of burglary. Affirmed.

William M. Smith, for appellant.

Dean W. Kelley, Prosecuting Attorney, for the people.

MCALVAY, J. Respondent was convicted in the circuit court for Clinton county of breaking and entering in the night-time a store building not adjoining to or occupied with a dwelling house, with intent to commit the crime of larceny, being charged under section 11547, 3 Comp. Laws. The case is before us on exceptions before judgment. The following taken from the record will indicate what occurred upon the trial material to the question now before the court:

"To the foregoing information the respondent pleaded not guilty, and by his attorney in open court at the beginning of the trial said respondent admitted that he was guilty of the larceny of the goods in question, but denied that he was guilty of the burglary contained in the information.

"Said cause was tried in open court before a jury chosen and sworn on the 10th day of December, A. D. 1907, and upon said trial said respondent took the stand in his own behalf and testified that on or about the night in question, he, while intoxicated, walked along the street which passed in front of the store in question, and that he left said street and passed along the side of the said store building to a point about sixty feet from the said street and there saw a window of said store raised about a couple of inches so he could put his hands under the window, which window was held down by its own weight only, and that he did put his hands under the window and pushed it up far enough so that the opening would admit his body, and that he crawled through said window into the store. He also testified that he was drunk at the time, and did not before he went into the store through the window, or at the time he was going into the store through the window, have any intention

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of stealing anything in the store, but he admitted that after he went into the store he did steal, take and carry away a horse blanket and a fur overcoat. The respondent further testified that he and another workman had been working in and about the said store building in repairing the same on two different days a few days previous to the night in question, and that in doing their work they had occasion to and did raise this window, and the testimony in the case on behalf of the people tended to show that the window had stops or plugs for the purpose of holding the same in place, and that as far as the proprietors of the store had knowledge the window had not for a long time been opened or raised previous to the time respondent worked at repairing the building; and they had no knowledge that it was raised on that occasion, and that the proprietors of the store building in question had no knowledge that said window was opened to any extent on the night in question, and that as far as they had knowledge the window was closed completely in the usual manner prior to and at the time respondent gained entrance into the building as testified to by him. The testimony of the people showed, however, that an employé, who was deceased at the time of the trial, had charge of the room and window in question on the day preceding the entering into the building by respondent, and no person on the part of the people testified positively that the window was not open on the night in question as testified to by respondent.

"The testimony of the people was to the effect that said horse blanket and said fur overcoat were worth less than $25."

Upon the theory that such an entering as was testified to and admitted by respondent did not in law amount to a burglarious breaking and entering, his attorney presented four requests to charge the jury to the effect that respondent could not be found guilty of burglary, and that under the evidence he could be convicted of no graver offense than larceny. The court refused to charge the jury as requested, and upon the point at issue charged as follows:

"Now you will notice that the charge here in this information says that the respondent feloniously did break

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and enter this building with intent to commit the crime of larceny therein. Under the evidence which is undisputed as to the material points in that regard, the court has assumed the burden and now instructs you that as to the breaking and entering the court charges you that under the evidence there was such a breaking and such an entering as satisfies the law so far as committing this offense was concerned in this case.

"In other words, the manner in which the respondent himself says that he went through the window and entered the building, the court thinks as a matter of law, and now instructs you, is a sufficient breaking and entering to constitute the crime of burglary, providing the other elements that are necessary to make up the crime are found to exist, so that you need not take up any time in the jury room in passing upon the question of breaking and entering."

The errors alleged are that the court erred in refusing to give the requests, and in charging as above quoted. The only matter for the court to determine is whether the admitted facts in the case constitute a burglarious breaking and entering.

It is insisted upon the part of the respondent that the lifting of a window which is partly open, in order to make an aperture large enough to admit the intruder, is not a breaking. Several eminent text-writers and decisions of courts of other States are cited in support of this contention. The tendency of the courts of late has been to hold that but the slightest force is necessary to constitute a breaking. For example: pushing open a closed door; opening a screen door which is held by its springs, the door of the house being open; removing a screen; entering through an unfastened transom which hung in place by its own weight; entering a mill through a hole cut for the purpose of allowing a belt to run, by pushing aside the belt; entering a mill house through a small hole under the sill; taking goods from a building by thrusting the arm through an opening either made or enlarged for the purpose; entering a house by coming down through the chimney; lifting a cellar door; raising

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the sash of a window, shut down close, but not fastened; pulling down an upper sash; all have been held to be a sufficient burglarious breaking.

In this State the same tendency appears. It was held that the removal of an iron cellar-window grating was a breaking within the statute (*People* v. *Nolan*, 22 Mich. 229); also pushing open a closed but unfastened transom swinging horizontally on its hinges (*Dennis* v. *People*, 27 Mich. 151). It was held that the fact that a respondent slightly raised a window in the daytime, so that the bolts which fastened it down would not be effectual, would not divest his subsequent breaking and entering through the window in the night-time of the character of burglary. *People* v. *Dupree*, 98 Mich. 26.

Respondent urges that because this window was raised two inches there was no "breaking," but admits in his brief that had the window been closed and he had raised it, although it was not fastened and it was necessary to overcome but its weight, it would have constituted a "breaking." As stated above, such reasoning is supported by respectable authority. This, however, does not appeal to our judgment as sound reasoning. We think the rule adopted in the instances above quoted is a reasonable one. It is, in effect, that if any force at all is necessary to effect an entrance into a building, through any place of ingress, usual or unusual, whether open, partly open or closed, such entrance is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present. We think such holding is in harmony with *Dennis* v. *People*, and *People* v. *Dupree*, supra.

A recent Tennessee case is exactly in point. The respondent entered a house in the night-time through a window found partially raised from the bottom, which he opened sufficiently to admit his person. In this case the court considers many of the instances referred to in this opinion, and cites the cases. The opinion concludes:

"It seems to us a useless refinement to hold that the

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various instances above cited are sufficient evidence of breaking, and that the further raising of a window partly open is not sufficient evidence, when the opening in the window is enlarged by the person entering so as to make the aperture sufficient to admit his body. Here is a material change of the status, and the change is accomplished by the application of force." *Claiborne* v. *State*, 113 Tenn. 261 (68 L. R. A. 859), and cases cited.

The circuit was not in error in holding the acts of respondent a sufficient breaking and entering. The conviction is affirmed. The cause will be remanded to the court below for the entry of a judgment in accordance with the verdict, and respondent will be brought before that court for sentence.

OSTRANDER, HOOKER, MOORE, and CARPENTER, JJ., concurred.

DUMMER *v.* UNITED STATES GYPSUM CO.[1]

1. STATUTE OF FRAUDS—EASEMENTS—ORAL AGREEMENTS—VALIDITY.
   An oral agreement for a right of way over land for a spur track is void under the statute of frauds.

2. EASEMENTS—ACQUISITION—PRESCRIPTION.
   Title to an easement may be acquired by prescription in the same time as required in the case of land.

3. SAME—ADVERSE POSSESSION.
   Title or rights in lands founded on prescription originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner, by his acquiescence, has granted

[1] Rehearing denied September 10, 1908.

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the land, or interest in the land, so held adversely; and where it appears that the claimant of an easement and his predecessors did not at any time before the interference complained of make uninterrupted use of the claimed easement for the statutory period of 15 years the claim of prescriptive easement fails.

Error to Kent; Wolcott, J. Submitted May 8, 1908. (Docket No. 32.) Decided July 13, 1908.

Trespass quare clausum fregit by William F. Dummer against the United States Gypsum Company and the Pere Marquette Railroad Company. There was judgment for plaintiff against defendant United States Gypsum Company, and it brings error. Reversed.

Butterfield & Keeney (*Albert N. Eastman*, of counsel), for appellant.

Kleinhans & Knappen (*Charles Henry Dummer*, of counsel), for appellee.

MOORE, J. This case was tried before a jury. At the conclusion of the testimony offered by the plaintiff, the trial judge directed a verdict in favor of the railroad company, but submitted the case against the other defendant. A verdict for $12,000 was rendered in favor of the plaintiff. The case is brought here by writ of error. The issues involved and the claims of the respective parties were so admirably stated by the late Judge Wolcott in his charge to the jury, that we cannot do better than quote therefrom:

"Gentlemen of the jury: This is an action brought by William F. Dummer, as plaintiff, against the United States Gypsum Company and the Pere Marquette Railroad Company, as defendants. The court has already stated to you that you should return a verdict of no cause of action as to the Pere Marquette Railroad Company. I have already stated on the record the reason for directing a verdict as to that company, and will not repeat it again here. So you will consider this case as if brought against the United States Gypsum Company alone.

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"In order that the jury may have clearly before it the situation, I will state to you the theories and claims on the part of both the plaintiff and defendant. In stating these claims I do not intend to intimate what the opinion of the court might be as to any point. What the facts are and what claims on either side have been established by the evidence are solely matters for the jury to determine from the evidence in the case.

"The plaintiff's claim in this case is substantially this: That in 1873 the mill properties now owned by the plaintiff south of Grandville, on sections 19 and 20 of Wyoming township, were owned by the Grandville Plaster Company and the Grand River Valley Plaster Company, respectively, and that the property now owned by the defendant, the United States Gypsum Company, on sections 17 and 18, together with 15 acres on the south end of section 18, which now belong to one Olthoff, were owned by Dr. H. O. Weston. That upon section 20 was located a mill for the manufacture of gypsum products, which mill had at that time begun operations. That on section 19 a mill was then in process of construction, which mill was to be operated for the same purposes, and was in fact so operated after its construction. That on the property of Dr. Weston on section 18 was located a gristmill in active operation, and that Dr. Weston had also at that time the intention of putting up another mill on his property for the manufacture of gypsum products. That at this time, viz., in 1873, none of these mills had a side track or railroad facilities, but that a railroad was running through Grandville substantially east and west, and at a distance of about three-quarters of a mile from the mills of the Grandville Plaster Company and the Grand River Valley Plaster Company, called, respectively, the 'Red' and 'White' mills. This railroad was the same one that is now owned and operated by the Pere Marquette Railroad Company. That in the year 1873, under the conditions above stated, it was agreed by Dr. Weston and the owners of the red and white mills that all three mills should join in obtaining side-track facilities, and the plaintiff claims that to this end the owners of the red and white mills agreed that they would grade and complete, all ready for the ties and rails, a roadbed from the main line of the railroad substantially south through the village of Grandville and through the property of Dr. Weston, and down to the red and white

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mills, this embankment and the track, when laid, to be used to connect all three mills with the main line of the railroad.

"The plaintiff claims that in consideration of this agreement on the part of the owners of the red and white mills to construct this roadbed and pay the entire cost thereof that Dr. Weston agreed to give to the owners of the red and white mills a perpetual right of way over his lands sixty feet wide upon a line agreed between them. The plaintiff claims that thereafter the projected line was surveyed and the owners of the red and white mills carried out their contract and agreement with Dr. Weston, and constructed at their expense and at a cost of between $3,000 and $4,000 the roadbed from the main line through the village of Grandville and across property owned by Mr. Hooper, for the right of way across which the owners of the red and white mills paid, and to the mill of Dr. Weston on section 19, and from that point to the red and white mills. The plaintiff claims that the grade and embankment and temporary bridge were completed ready for the ties and rails in 1873, with the exception of the short spur at the southerly end to the red mill, which was completed in 1874. The plaintiff claims that at once upon completion the representatives of the railroad company came to Grandville, and some agreement was made by which they agreed to put down ties and rails, and that the putting down of the ties and rails followed immediately after. And the plaintiff claims that this agreement with the said railroad was only supplementary to the one previously made between the then owners of the red mill and the white mill with Dr. Weston, and in furtherance of the same. The plaintiff claims that from the time of putting down these rails the owners of the red and white mills, now owned by Mr. Dummer, have continuously used this spur track for having conveyed in railroad cars to the railroad their manufactured products, and having conveyed to the mills from said railroad all their fuel and supplies down to the time of the temporary removal of the rails on the roadbed of the said spur track, and the right to the use of said main spur track was not interrupted until the time of the grievances complained of in this declaration. And the plaintiff claims that this user was continued, as above stated, excepting as the mills were from time to time shut down, and they had no occa-

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sion to use the spur track until the fall of 1902, at which time the defendant, the United States Gypsum Company, tore out the bridge across Buck creek, which was a constituent part of the spur track, and the defendant thereafter refused to replace the bridge or to allow the said bridge and the rails to be restored. The plaintiff claims that because of the agreement made in 1873, as claimed and carried out by the owners of the red and white mills, the owners of the red and white mills entered into the enjoyment and possession of the right of way under a claim of right, and that thereafter all of the successive owners of the mills enjoyed and used the right of way and said spur track under said claim of right and without interruption by anyone. The plaintiff claims that until December, 1898, the owners of the red and white mills had never received any notice that their right to use the tracks was questioned in any way by the successive owners of the property now owned by the defendant, the United States Gypsum Company, and across which said side track ran, and that at the time of the first notice the side track in question had been used and enjoyed continuously whenever the mills were in operation for a period of substantially 25 years; and that at the time the plaintiff, who then owned the red and white mills and his predecessors in title, had acquired, as plaintiff claims, by such user an absolute right to the use of the spur track for hauling fuel, materials and products to and from the plaintiff's properties. The plaintiff claims that in 1901, while plaintiff's mills were temporarily idle, the Pere Marquette Railroad Company took up for temporary purposes and for use in another place, a part of the rails upon this spur track, but without intending the same as a hostile act as against plaintiff, or as a denial of his right to use the spur track in question, and that after the tearing down of the bridge by the United States Gypsum Company that the railroad company offered to replace the rails, and endeavored to prevail upon the defendant, the United States Gypsum Company, to allow the rails to be replaced and the bridge to be rebuilt. The plaintiff claims that the defendant, the United States Gypsum Company, refused to allow the same to be replaced. The plaintiff claims that he has also made verbal and written demands upon the said United States Gypsum Company to lay or permit to be laid ties and rails upon the roadbed of said spur track, but that the United States Gypsum Company refused to

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accede to all of said demands. And the plaintiff claims that because of the destruction by the defendant, the United States Gypsum Company, of the bridge upon the right of way, and the refusal to allow plaintiff to use the right of way for a side track, which he claims as his right as an appurtenance of said mill properties, as aforesaid, that the plaintiff has sustained the damages for the recovery of which this suit is brought.

"Now, on the other hand, the defendant claims that in 1873 Messrs. Nearpass and Cahoon paid for the grading of the right of way in question, and it was constructed with the consent of Dr. Weston, the then owner of the property, and these three turned over the possession and control of this right of way to the railroad company under an agreement that the company should lay the ties and track and keep the same in repair and have absolute control thereof. The defendant claims that that arrangement was carried out. The defendant further claims that the railroad company is the only one other than the defendant who has ever been in possession or control of said property or run cars or engines over the track. The defendant further claims that at or soon after this time those mills were put in operation; that the white mill was shut down for a year during 1877 and 1878 pending foreclosure proceedings, again from November, 1884, to October, 1885, pending another foreclosure proceeding, and from June, 1886, to the fall of 1891, and from 1898 to 1906. The defendant claims the red mill was shut down from 1875 to 1878, and for approximately 10 years between 1881 and 1891, and from 1893 to date. The defendant claims that whenever these mills have been in operation, except during the summer and fall of 1891, that the railroad company has hauled cars, filled with their freight, over this side track. The defendant claims that from approximately 1887 to the fall of 1891 the tracks upon the Vandenbush property were torn up and were relaid under an agreement with Frank Noble, who was about to operate the red and white mills, whereby he paid $200 for the use of that portion of the right of way owned by Vandenbush, while he, Noble, operated the mills; that the red and white mills were purchased by the plaintiff at a foreclosure sale in 1896, were repaired, set in operation in the fall of 1897, and run until the spring of 1899, when the defendant claims they were shut down and not operated

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again until 1906. The defendant claims that in December, 1896, Jenison, the owner of the property, served notice on the railroad company forbidding them to use this right of way; that in the summer of 1897 the Weston property was purchased by Messrs. Durr, Fulton, and Root; that before purchasing it they were assured by Mr. Jenison and the railroad company that the railroad company had no rights there except under a parol license. The defendant claims that in the spring of 1899 the Durr Plaster Company, who had purchased the property of Messrs. Durr, Root, and Fulton, served notice on the plaintiff to remove the tracks from section 17 and to desist from further using the entire road. The defendant claims that the railroad company were advised of this by the plaintiff, who requested them to compel the Durr Plaster Company to let them, the railroad company, remain in possession; that the railroad company refused to do this, and so advised the plaintiff; that the tracks were torn up on section 17, and within a year or so afterwards the railroad company voluntarily took up the tracks down to the Buck creek bridge. The defendant claims that the Durr Plaster Company constructed a permanent fence across the railroad track, fencing in their entire property. The right of way from which the tracks had been taken up soon grew up with woods and underbrush, and the Durr Plaster Company used the ground covered by the tracks running through their mill yard for rock storage. The defendant claims that in 1902 the Durr Plaster Company conveyed this property in its condition to the United States Gypsum Company by warranty deed, which company immediately went into possession. The defendant claims that in November, 1902, the United States Gypsum Company tore down the bridge and used the timbers for their work. At the time of doing this the local railroad officials protested and reported it to their superiors who paid no further attention to it. The defendant claims that no complaint or objection was made to this by the plaintiff or anyone else; nor did the defendant hear of it again until in November, 1904, when the plaintiff's attorney demanded the right to enter upon the property, relay the track and rebuild the bridge; that his demand was refused, and this suit was brought. This suit was brought against the United States Gypsum Company and the railroad company.

"The defendant further denies the existence of an ease-

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ment or its ownership by the plaintiff. It denies that in November, 1902, the plaintiff was in possession, and the defendant, with force and arms, entered upon this possession, ejected the plaintiff, tore down the bridge, and with force and arms kept the plaintiff ejected. But, on the contrary, the defendant claims that it purchased the property in good faith, without any knowledge or notice of this easement, entered into possession, and in the ordinary course of business, and in good faith, to meet the demands of its business, took down this bridge. The defendant claims that the railroad company is the only company who has had possession or control of this right of way, except the defendant and its predecessors in title. The defendant claims that the railroad company was in possession, under a parol license, and claims there can be no prescriptive title, for the reason there has been no continuous, open, adverse and hostile possession of the plaintiff and its predecessors in title under a claim of right. The defendant claims that the original entry was made under a verbal agreement with Dr. Weston. The defendant claims plaintiff's title does not come from its predecessors, but that through a foreclosure proceeding of a mortgage given before Dr. Weston obtained title, which, the defendant claims, makes a fatal break in the chain of title, the statute could not begin to run prior to 1882. The defendant claims that there are several subsequent breaks of a similar character in this chain of title, due to foreclosure proceedings; each one of which is a fatal break in the chain of continuity necessary to support a prescriptive title. The defendant claims there was a hostile possession of a portion of this road from 1887 or 1888 to 1891, which possession, the defendant claims, was recognized by Mr. Noble. The defendant claims that the plaintiff cannot claim a prescriptive right, unless he was in possession; that the only possession was that of the railroad, and that this possession must have been by contract or agency; and that in either event the plaintiff is bound by the acts of the railroad company, which company disavowed any title in 1897, the defendant claims, and voluntarily surrendered possession about 1901. The defendant claims that the acts of negligence of the plaintiff and his predecessors in title estopped him from asserting any such title as against the United States Gypsum Company, who, the defendant claims, was a purchaser in good faith for value and without notice."

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The record contains nearly a thousand printed pages, in which appear more than three hundred assignments of error, which are ably discussed in very voluminous briefs. Our view of the law as applied to the facts disclosed by the record is such that it will be unnecessary to discuss many of these assignments. The plaintiff had no record title to the easement. It is claimed that an oral agreement was made in 1872 or 1873 prior to or at the beginning of the easement. The trial judge rightly, as we think, said to the jury respecting that agreement, that, if made, it would be such an agreement as the statutes of this State require to be in writing, and, as an agreement, would be void.

It is the claim of plaintiff that he acquired a right to the easement by prescription. Upon that feature of the case the judge charged the jury as follows:

"Prescription, the term you have heard used here, is a mode of acquiring title to property or rights in property by long-continued possession, use and enjoyment; and in this State, if such possession, use and enjoyment is continued for 15 years it is presumed that a grant of the right was originally made. Such use and enjoyment, however, in order to ripen into a prescriptive right, must be adverse, exclusive, continuous and uninterrupted, under a claim of right, and with the knowledge of the owner of the land over which the right of way passes, or else used so openly and notoriously that the owner would be presumed to have knowledge. The term 'adverse' means a use under a claim of right and known to the owner of the land, a use without permission asked or given, a use of such a character that it cannot be accounted for except on the presumption of a grant. A use, on the other hand, which is permissive is not adverse and cannot become a prescriptive right, no matter how long continued. An acquiescence even for a long term of years between adjoining owners in the mutual use of switch tracks for their mutual convenience would not create an easement over defendant's lands, for the reason that such use would not be adverse or hostile.

"A license or permission to use is not hostile or adverse. To be adverse it must be under some claim of right. The claim of right need not necessarily be well founded. For

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example, in this case, a parol agreement for a perpetual right of way, if any was made, would, as I have told you, be void and not enforceable. Still this would not necessarily prevent a person going into possession or enjoyment of the right of way under such agreement and using the same adversely and under a claim of right. If the original use of this right of way was by permission of Dr. Weston, and in the way of a license, then it would not be adverse, and would not become adverse so that the statute of limitations would begin to run, until the owner of the land knew that the user of the right of way was asserting a right to its use, hostile to his own rights. In considering this question you have a right to consider all the evidence as to the original agreement between Dr. Weston, and Mr. Nearpass and Dr. Cahoon, the use made of the right of way thereafter, what knowledge was had by Dr. Weston and his successors in title as to such use by the owners of the red and white mills and the railroad company. You may also consider the various deeds introduced in evidence of the property now owned by the plaintiff, such deeds, as I remember, all describing the lands and conveying the lands with the appurtenances, but making no specific mention of the right of way. I have also said that the use of this right of way claimed by plaintiff, in order to become a right by prescription, must not only be adverse, but also continuous and uninterrupted.

"What constitutes continuous use depends somewhat upon the nature of easement claimed. The easement claimed in this case is a right of way for a railroad track over defendant's land for the use of cars to carry away the produce of the mills, and to bring in supplies to the mills. A continuous use in such case does not necessarily mean a daily, constant and unintermittent use; but it means that the acts constituting the use shall be of such frequency as to give notice to the owner of the land of the right claimed against him. A voluntary cessation of the use for a short time would not constitute an interruption so as to prevent the acquirement of a prescriptive right, unless it appeared that the person enjoying the right has no intention of resuming the right or unless it was under such circumstances that the owner of the land now owned by the defendant had reason to believe that the owners of the red and white mills did not intend to resume the use of the track.

"It appears from the evidence that from sometime in

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1886 until 1891, substantially five years, the mills now owned by the plaintiff were not in operation, and no use was made by them of the tracks. Whether such cessation of use would or would not interrupt the running of the time necessary to acquire a prescriptive right, depends somewhat upon the circumstances of the case. If the circumstances were such as would indicate that the owners of the plaintiff's mill had abandoned the use, or were not intending to longer assert any rights to the track (if you find they had been using it adversely before that time), or if the cessation of use was under such circumstances and for such a period of time that the owners of the land over which the tracks ran, would have reason to believe that the person using the tracks had abandoned the use, or were no longer asserting any right to use the tracks, then the cessation of the use would be an interruption of the running of the time necessary to give a right by prescription, viz., 15 years. On the other hand, if the cessation of use was under such circumstances known to the owner of the land over which the tracks were laid as indicated no intention to abandon the use, or forego any rights claimed therein, but was apparently only a nonuser for the period when the mills were not in operation, if the circumstances were such, you would be warranted in finding it was not such an interruption of the use as would be fatal to a claim of prescription. In considering this question you should consider all that the evidence shows as to the condition of the mills during that period, the condition of the track, the removal of some of the rails and ties, if there was such removal, and the purpose of such removal the taking out of some portion of the ties by Mr. Vandenbush, if he did, and the use made by him of any portion of the right of way or tracks, and the building of a fence across the track, or the placing of a gate therein. (I do not recall exactly the period when it is claimed these things were done, but I think sometime during this five years.) Also the evidence as to payment by Mr. Noble to Mr. Vandenbush for going on land then owned by him and relaying the track, and also if the evidence shows that it occurred during that time a request was made by Mr. Noble of Mr. Day for permission to relay the track.

"You may also consider the evidence, on the other hand, as to the reason for the closing of the mills, the organization of what was called, I think, the plaster pool

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or agency, so far as the same shows, if it does, a reason for the closing of the red and white mills during that period, and the knowledge of Mr. Day, then in possession under a contract of purchase of the lands now owned by defendant, if the evidence shows that he did have knowledge of the facts in that regard. There is evidence of other shorter periods when the mills now owned by the plaintiff were not in operation and the tracks not in use, and perhaps other instances of the taking up of other portions of the track. I do not undertake to state the testimony, if any, in that regard. As to any of these periods of cessation of use of these tracks by the plaintiff or his predecessors in title (if they used them at all), whether for longer or shorter period, the same rule I have given will apply. It is for the jury, in consideration of all the evidence in the case, to say whether or not the plaintiff has shown a continuous, adverse, uninterrupted and exclusive use of these tracks (as I have defined these terms), and under a claim of right for 15 consecutive years prior to the acts of the defendant complained of."

Was this a correct statement of the law as applicable to the facts in this case? It has already appeared that the use of the easement, if it was an easement, began in 1872. The expiration of the 15 years' use necessary to ripen into a prescriptive right would require the use to continue until 1887. The parties are all agreed that title to an easement may be acquired by prescription in the same time as required in case of lands. *Hoag* v. *Place*, 93 Mich. 450 (18 L. R. A. 39); *Williams* v. *Barber*, 104 Mich. 31; *Nowlin Lumber Co.* v. *Wilson*, 119 Mich. 406; *Toney* v. *Knapp*, 142 Mich. 652. The record discloses that there were at various times periods of very considerable length when the mills were idle and the easement not used, sometimes one or two years elapsing and an idleness of several years when the owners of the mills were parties to a pooling arrangement. The defendant insists that the record is clear that the use was not continuous and uninterrupted within the meaning of the law, while it is the claim of plaintiff that in fact and law it was continuous. The claim of plaintiff is stated in the brief of counsel as follows:

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"Continuous and uninterrupted. Such periods as the mills were not in operation, and the track not in use did not constitute interruptions in the use of the easement. The test is simply whether the easement is used at the pleasure of the person claiming it without interruption. Continuous enjoyment for the statutory period is not destroyed by proof of occasional intermission in actual use. Constant user of an easement is not essential to the running of the statute. It is enough if used when necessary. *Cornwell Manfg. Co.* v. *Swift*, 89 Mich. 503; *Cox* v. *Forrest*, 60 Md. 74. A user is continuous if the easement is used at the pleasure of the person claiming it, without interruption. *Winnipiseogee Lake Co.* v. *Young*, 40 N. H. 420; *Collins* v. *Gray*, 3 Cal. App. 723. It is sufficient if used for the statutory period whenever desired. *Garrett* v. *Jackson*, 20 Pa. 331; Washburn on Easements and Servitudes (4th Ed.), p. 130. A use may be continuous though not constant—the test is if it is used whenever claimant chooses to use it. *Bodfish* v. *Bodfish*, 105 Mass. 317, 319. A voluntary cessation of user does not constitute a fatal interruption, unless it appears there was no intention of resuming its use. *Dana* v. *Valentine*, 5 Metc. (Mass.) 8; *Ferrell* v. *Ferrell*, 1 Baxt. (Tenn.) 329. Although a right is not exercised during some years for the convenience of the claimant, this does not necessarily amount to an interruption. *Earl De La Warr* v. *Miles*, L. R. 17 Ch. Div. 535; *Hesperia Land & Water Co.* v. *Rogers*, 83 Cal. 10. A mere intermission of use or nonuser does not amount to an interruption, unless it amounts to an abandonment. Nonuser is voluntary, and interruption is from without. Jones on Easements, § 189; *Carr* v. *Foster*, L. R. 3 Q. B. 581, 588; *Lawson* v. *Langley*, 4 Ad. & El. 880; *Hall* v. *Swift*, 4 Bing. (N. C.) 381; *Bodfish* v. *Bodfish*, 105 Mass. 317. The words 'continuous' and 'uninterrupted' are often applied to the user of an easement. These words have often been defined by the courts. We cite a few illustrative expressions: In *Swan* v. *Munch*, 65 Minn. 500, 503 (35 L. R. A. 743), it is said:

" 'Where the claimant needs the use of the easement from time to time, and so uses it, there is a sufficiently continuous use to be adverse, although it is not constant.'

"And, again, it is said:

" 'This is a continuous use, and an omission to use it when not

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needed would not disprove a continuity of use, or defeat her (the claimant's) right to an easement by prescription.'

"In *Cornwell Manfg. Co.* v. *Swift*, 89 Mich. 503, the term 'continuous' is defined as applied to an easement. Of the use it is said:

" 'It must be continuous and uninterrupted, but not necessarily constant. It is necessarily an irregular use, depending upon season and rainfall; and it is sufficient if the use be the ordinary use, and be resorted to without interruption whenever necessary in the operation of the power.'

"This case involved a prescriptive right to overflow lands. In *Hesperia Land & Water Co.* v. *Rogers*, 83 Cal. 10, defining the term 'continuous use,' as applied to an easement, it is said:

" 'If, whenever the claimant needs it from time to time, he makes use of it, this is a continuous use.'

"If the claimant of an easement in real property needs its use from time to time, and so uses it, there is a sufficiently continuous use to be adverse although it is not constant."

Counsel also cite other cases.

Again we quote from the brief:

"(June, 1886—June, 1891.) The Plaster Pool. During this period it is practically undisputed upon the record that both mills of the Union Plaster Company were closed, and very slight use made of the spur track. Counsel for defendant rely very largely upon this period as constituting an interruption in the user of the easement, which is claimed to have broken up the prescriptive period so as to render the user prior to 1886 entirely nugatory. As we have shown heretofore in this brief, it is not continual use of an easement, in point of time, which is required for a prescriptive title, but continuous use in the sense that the person claiming the easement uses the same whenever he so desires. *Carr* v. *Foster*, supra, and many other cases cited. The proposition of law is thoroughly established that, as shown by the above-cited authorities, failure to use during a period of years does not interrupt the running of the statute, provided there is no intention to abandon. The sole test is whether the right of way was used whenever desired during the requisite period of years."

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It will be observed that the claim of counsel, in effect, is that even though the owners of the mill thought it more profitable to enter into a pooling arrangement and stop their mills for a series of years, instead of running them, thereby making it unnecessary to use the easement, that the statute would run in favor of the owners, though there was no use in fact during that period. A reference to some of the cases cited will not sustain that claim. In *Hesperia Land & Water Co.* v. *Rogers*, 83 Cal. 10, in disposing of the case, the following language was used:

"The correct rule as to continuity of user, to give a presumptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. The right is not abandoned to the use of a ditch to convey water for purposes of irrigation because water does not flow in it every day in the year. The party claimant does not need the ditch every day in the year, and the law does not require him, to constitute continuity of use, to use the water when he does not need it. If he has used the ditch at such times as he needed it, it is regarded by the law as a continuous use. If a right of way over another's land has been used for more than five years, it is not necessary, to make good such use, that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it, to make his use of the way continuous. The claimant is required to make such reasonable use of the way as his needs require. So it is of the ditch. If, whenever the claimant needs it from time to time, he makes use of it, this is a continuous use. An omission to use when not needed does not disprove a continuity of use, shown by using it when needed. (*Bodfish* v. *Bodfish*, 105 Mass. 319.) Neither such intermission nor omission breaks the continuity."

In *Cox* v. *Forrest*, 60 Md. 79, the following language was used:

"This is an action to recover damages for obstructing a private right of way, claimed over the land of the appellee. In the absence of an express grant, it was necessary

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for plaintiffs to prove an adverse, exclusive, and uninterrupted enjoyment of the right of way in question for twenty years.

"By adverse is meant a user, without license or permission, for an adverse right of an easement cannot grow out of a mere permissive enjoyment, the real point of distinction being between a permissive or tolerated user, and one which is claimed as a matter of right. Where one, however, has used a right of way for twenty years unexplained, it is but fair to presume the user is under a claim of right, unless it appears to have been by permission. In other words, the use of a way over the lands of another whenever one sees fit, and without asking leave, is an adverse use, and the burden is upon the owner of the land to show that the use of the way was by license or contract inconsistent with a claim of right. *Bachelder* v. *Wakefield*, 8 Cush. (Mass.) 243; *Hall* v. *McLeod*, 2 Metc. (Ky.) 98; *Garrett* v. *Jackson*, 20 Pa. 331; *Tickle* v. *Brown*, 4 Ad. & El. 369; *School District* v. *Lynch*, 33 Conn. 334; *Hammond* v. *Zehner*, 23 Barb. (N. Y.) 473.

"By exclusive the law does not mean that the right of way must be used by one person only, because two or more persons may be entitled to the use of the same way, but simply that the right should not depend for its enjoyment upon a similar right in others, and that the party claiming it exercises it under some claim existing in his favor, independent of all others. It must be exclusive as against the right of the community at large.

"Nor does the law mean by 'an uninterrupted and continuous enjoyment,' that a person shall use the way every day for twenty years, but simply that he exercises the right more or less frequently, according to the nature of the use to which its enjoyment may be applied, and without objections on the part of the owner of the land and under such circumstances as excludes the presumption of a voluntary abandonment on the part of the person claiming it."

In *Cornwell Manfg. Co.* v. *Swift*, 89 Mich. 503, the following language was used:

"Defendants have, however, rights of pondage upon the portions of section 17, from which they have been excluded, not only by grant, but by prescription as well. Occupation and a use of a right of flowage or pondage, in order to create a prescriptive right, need not be constant,

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in the sense of a daily occupancy or use. It must be continuous and uninterrupted, but not necessarily constant. It is necessarily an irregular use, depending upon season and rainfall; and it is sufficient if the use be the ordinary use, and be resorted to without interruption whenever necessary in the operation of the power."

Without quoting further from the authorities cited by plaintiff, we may say of them that none of them stand for the proposition that the user of the easement may put himself in a position where he has no occasion to use the easement and then say that "the sole test is whether the right of way was used whenever desired during the requisite period of years."

The question of acquiring title by prescription is not a new one in this State. In *Rayner* v. *Lee*, 20 Mich. 384, Justice COOLEY, speaking for the court, said:

"The second objection made to complainant's title is, that, although he shows an unbroken chain of conveyances extending back more than twenty years, he does not show continuous possession under them, and consequently cannot claim title by adverse possession.

"This objection is based upon the facts, that on two or three occasions there were brief periods when the premises were not occupied at all, and that, at other times, there were persons in possession who are not distinctly shown to have occupied under any of the parties in complainant's chain of title. We attach no importance to the breaks in the possession. The evidence would indicate that they were only brief intervals between the departure of one tenant and the entrance of another; not at all indicating an intention on the part of the claimant to abandon his right. At no time were the premises vacant for any considerable period, and the evidence shows that in every year since 1842, some one under whom the complainant claims has assumed to be the owner, and has exercised public and notorious acts of ownership."

In *Yelverton* v. *Hilliard*, 38 Mich. 355, Justice GRAVES, speaking for the court, said:

"The defense is based upon a continuous adverse possession under the tax deeds for 10 years next preceding July 26, 1875, when the suit was instituted. The finding

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is distinct as to such possession from that event back to January 4, 1866, when defendant received his deed. But the difficulty appears when we come to the interval between that date and July, 1865, a space of time required to make out the 10 years. Admitting, for the purpose of the question, that the fact as found in regard to Turner's entry and occupancy is sufficient for the time covered by it—that is, from the spring of 1865 until October or November of that year—and still there is a considerable space left between July, 1865, and the commencement of defendant's possession, January 4, 1866. As the finding reads, the premises were vacant from the time Turner took off his little crop of turnips in October or November, 1865, to the entry of defendant in the succeeding January, and during this period there seems to have been no adverse possession and no obstacle to an entry by the plaintiff. The finding, therefore, not only fails to show 10 years' possession under the tax deeds next preceding the commencement of the action, but, on the contrary, shows affirmatively that the possession was for a shorter period. The judgment is therefore not supported by the facts, and must be reversed."

In *Winchell* v. *Clark*, 68 Mich. 64, Justice MORSE, speaking for the court, said:

"The dam of plaintiff, at the time it was destroyed, had not been maintained long enough for her to acquire a right by adverse user to keep it there. It is not shown to have been built, for a certainty, before 1868, and it was torn down in 1882. The circuit judge was right in holding, as a conclusion of law, that the dam erected by the plaintiff invaded the rights of Clark & Amsden to their water privileges, and that its maintenance as against them was unlawful. He was also correct in the proposition that the flowing of defendant's land and the injuring of his water privileges by the dam of plaintiff was a nuisance which he had the right to abate. Wood on Nuisances (2d Ed.), pp. 976, 977; *Adams* v. *Barney*, 25 Vt. 231; *Hodges* v. *Raymond*, 9 Mass. 316; *Colburn* v. *Richards*, 13 Mass. 420; *Elliot* v. *Railroad Co.*, 10 Cush. (Mass.) 195."

In *Turner* v. *Hart*, 71 Mich. 128, Justice CHAMPLIN, speaking for the court, said:

"No grant of the right of flowage of the lands of com-

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plainants is claimed. The defense rests upon rights acquired by prescription; and in such case the burden of proof is upon the defendants to show that they have, for a period of 15 years at least, each year flowed complainants' lands to the height complained of and established by their proofs, and that such use of complainants' lands by flowage has been adverse, uninterrupted, peaceable, open and notorious. No testimony was introduced to show that the effect of the old dam, with or without the flash boards, was to set the water back and to flow over complainants' lands to the height it has since 1881, nor to show that it so flooded the land as to interfere with or destroy the crops of complainants prior to that time, for a period of 15 years. This branch of the defense has utterly failed for lack of proof. It was claimed on the part of counsel for defendants that we should apply the rule adopted in Massachusetts, and laid down in *Cowell* v. *Thayer*, 5 Metc. (Mass.) 253, and approved in *Ray* v. *Fletcher*, 12 Cush. (Mass.) 200, that the height to which a mill owner will have a prescriptive right to maintain the water will depend upon the height of the dam by which he has raised it, and not upon the height such dam has set the water back and flowed the land in question during the prescriptive period; and, therefore, if he repairs the dam without so changing it as to raise the water higher than the old dam, when tight and in repair, would raise it, and thereby keeps the water more constantly and at a greater height than before, it is not a new use of the stream, but a use conformable to his prescriptive right. We cannot accede to this doctrine. It is antagonistic to the principle which underlies the doctrine of prescription. Title or rights in lands founded on prescription originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner, by his acquiescence, has granted the land, or interest to the land, so held adversely. But no one can be said to acquiesce in a claim which he cannot dispute by bringing an action at law to determine; and hence the statute of limitations requires that an action shall be brought within 15 years after the right first accrues or the adverse entry. The defendants, therefore, acquired no right by prescription to the lands in question until they showed that the acts which constituted the adverse user injured complainants, and gave them, or to those under whom they claim title, a right of

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action. *Holsman* v. *Bleaching Co.*, 14 N. J. Eq. 335; *Smith* v. *Russ*, 17 Wis. 234; *Sabine* v. *Johnson*, 35 Wis. 185; *Burnham* v. *Kempton*, 44 N. H. 90; *Griffin* v. *Bartlett*, 55 N. H. 123; *Mertz* v. *Dorney*, 25 Pa. 519."

In *Pendill* v. *Agricultural Society*, 95 Mich. 491, Chief Justice HOOKER, speaking for the court, said:

"In the case of *Yelverton* v. *Steele*, 40 Mich. 541, Mr. Justice GRAVES, in stating the law upon the subject of adverse possession, said:

"'The doctrine which sanctions the divestiture of the true owner by hostile occupancy is to be taken strictly, and the case is not to be made out by inference, but by clear and cogent proof'—supporting his opinion by numerous authorities.

"He quotes with approval the language of Mr. Justice Duncan where he says that 'it must be an actual, continued, visible, notorious, distinct, and hostile possession.' While it would have been the duty of the court to direct a verdict for the plaintiffs in case of the absence of the clear and cogent proof upon any one of these six requisites, he could not properly direct a verdict for the defendant unless each and every one of them was established by such proof, uncontroverted; for, the moment that any evidence fairly tending to disprove one of them was given, a question of fact for the jury arose, whether it was shown by plaintiffs or appeared from the examination of defendant's witnesses."

In *Judson* v. *Wiley*, 96 Mich. 255, Chief Justice HOOKER, speaking for the court, said:

"Where title to land is sought to be divested upon no better claim than occupancy, it can be justified only by clear and cogent proof upon each of the essential elements of adverse possession. *Yelverton* v. *Steele*, 40 Mich. 538; *Pendill* v. *Agricultural Society*, 95 Mich. 491. And, until each of these is supported by something more than an inference, the question should not be submitted to the jury. When there is evidence upon each of them which, if believed, can be said to establish adverse possession, the case should go to the jury. * * * This testimony was all admissible, but falls short of that 'clear and cogent proof' which permits the divestiture of title to land.

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Some of the cases seem to have given rise to the assumption that adverse possession becomes a question for the jury when there is any admissible evidence tending to establish it, but we understand the rule to be that until the evidence reaches the required degree of clearness and cogency (which is manifestly a question for the court) there is nothing to go to the jury; and it is a clear duty of courts to protect the rights of landholders from the danger of capricious verdicts by refusing to allow consideration of the question of adverse possession by a jury until evidence sufficient to make a prima facie case, under the rule laid down in the case of *Yelverton* v. *Steele*, has been introduced. The jury should have been directed to render a verdict for the plaintiffs."

It should be stated that in this case Justices MCGRATH and MONTGOMERY concurred for the reason that the possession was interrupted for several years. See, also, *Butler* v. *Bertrand*, 97 Mich. 59; *Beck* v. *Schick*, 110 Mich. 665; *Ann Arbor Fruit & Vinegar Co.* v. *Railroad Co.*, 136 Mich. 599 (66 L. R. A. 431).

Applying these principles of law to the case in hand, what do we find? The record discloses, not only that plaintiff has failed to establish his title to the easement by clear and cogent proof upon each of the essential elements of adverse possession, but the record discloses affirmatively that he and the previous owners did not, at any time before the bridge was destroyed, continuously and visibly for 15 years make use of the easement. A verdict should have been directed in favor of defendant. This conclusion makes it unnecessary to discuss the other assignments of error.

Judgment is reversed, and new trial ordered.

BLAIR, OSTRANDER, CARPENTER, and MCALVAY, JJ., concurred.

HOOKER, J. I concur in the opinion that the nonuser stated in the above opinion, if it was adverse, is such as to defeat plaintiff's claim.

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O'DELL v. GOFF.

1. APPEAL AND ERROR—DECISION ON FORMER APPEAL—LAW OF THE CASE.

A determination on a former review that the testimony warranted the submission of certain questions to the jury will be followed on a subsequent review on a record not materially different from the former one.

2. WILLS — CONTEST — TESTAMENTARY CAPACITY — INSANE DELUSIONS—EVIDENCE—SUFFICIENCY.

In proceedings to probate a will, contested on the ground that testator's belief in the illegitimacy of his son was an insane delusion, evidence examined, and *held*, that there was evidence from which the jury might infer that his belief was not reached by weighing testimony, but was merely the offspring of his monomania upon the subject of spiritualism, and that the question whether testator's belief was an insane delusion was, therefore, a proper one for the jury.

3. JUDGMENT—FOREIGN JUDGMENT—VALIDITY—COLLATERAL ATTACK — JURISDICTION — EVIDENCE — STATUTES — EXTRATERRITORIAL EFFECT.

A statute of Indiana making the affidavit of the petitioner in a divorce case prima facie evidence of his bona fide residence necessary to confer jurisdiction upon the courts of that State, merely prescribes a rule of evidence for the courts of Indiana, ineffective here, and does not prevent a showing here that the petitioner was in fact a resident of Michigan, and that the courts of Indiana had no jurisdiction.

4. EVIDENCE—ADMISSIONS—STATEMENTS OF OTHERS—FAILURE TO DENY.

Failure of the defendant in a divorce case to deny statements contained in a deposition, of the taking of which she had notice, cannot be taken as an admission that such statements were true, where the controversy was being tried by a court of another State which had no jurisdiction because of the nonresidence of the parties.

5. WILLS — CONTEST — TESTAMENTARY CAPACITY — ISSUES — EVIDENCE—REPUTATION—ADMISSIBILITY.

In proceedings to probate a will, contested on the ground that testator's belief in the illegitimacy of his son was an insane

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delusion, the chastity of testator's wife, contestant's mother, was in issue, and evidence of her chaste reputation was admissible.

6. EVIDENCE—REPUTATION—PRESUMPTIONS—EFFECT.
The issues being such that contestant could not prevail without convincing the jury that his mother was in fact chaste, the fact that there was no evidence of lack of chastity, and that contestant might, if he chose, rely upon the presumption of chastity, affords no ground for ruling that affirmative proof of chastity was inadmissible.

7. APPEAL AND ERROR — EXCEPTIONS — NECESSITY — RULINGS ON EVIDENCE.
Rulings admitting testimony to which no exceptions were taken cannot be reviewed.

8. SAME—BRIEFS—LIMITING SCOPE OF REVIEW.
A point made upon the oral argument as to the competency of nonexpert witnesses to express an opinion, not made in the brief nor in the trial court, will not be considered.

9. WILLS—CONTEST—INSANE DELUSIONS—MONOMANIA—EXPLANATIONS—WITNESSES—CREDIBILITY.
Where, in a will contest, in which one of the issues was whether testator was a monomaniac upon the subject of spiritualism, contestant introduced testimony tending to prove that testator entertained the belief that a departed spirit brought and gave to him a crisp new $5 bill, permission to an expert offered by proponents to explain the circumstance, on the theory that the belief of testator was rational from the standpoint of a spiritualist, was properly denied, where it appeared that the proffered explanation would only have brought into the case a theory of spiritualism which, if believed by the jury, would have justified their discrediting contestant's witnesses who had sworn that testator entertained such belief, that not being a proper test of the credit of the witnesses.

10. TRIAL—INSTRUCTIONS—SUBMISSION TO JURY—HARMLESS ERROR.
The practice of allowing counsel themselves to read to the jury such of their requests to charge as have been approved by the court, instead of the trial judge himself reading them or making them a part of his general charge, though not approved, furnishes no ground for reversal in a case in which counsel did not object nor except to it.

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11. SAME—REFUSAL OF REQUESTS.

The court may in its discretion refuse requests to charge which emphasize the importance of the testimony of a particular witness.

12. WILLS—CONTEST—UNDUE INFLUENCE—INSTRUCTIONS—PROPRIETY.

On the trial of a will contest, an instruction that "No declarations or statements made by testator before or after he made his will can be considered by you as any proof of undue influence, or that he was unduly influenced in making his will," was properly refused, since, though the declarations furnished no evidence that others exerted an undue influence, they might afford evidence of the effect of said influence upon his will.

Error to Cass; Coolidge, J., presiding. Submitted June 9, 1908. (Docket No. 52.) Decided July 13, 1908.

B. O'Dell and others presented for probate the last will and testament of John F. Goff, deceased. The will was allowed in the probate court, and Leslie Goff appealed to the circuit court. There was judgment for contestant, and proponents bring error. Affirmed.

A. Lynn Free (*Alfred J. Mills*, of counsel), for appellants.

Smith & Lyle (*Victor M. Gore*, of counsel), for appellee.

CARPENTER, J. The purpose of this suit is to probate the will of John F. Goff, deceased. That will gave to contestant, Goff's only son and heir, about $1,800, and bequeathed the balance of the estate of about $41,000 to found a home for spiritualistic mediums. This is the second time the case has been heard in this court. Our first decision will be found reported in 149 Mich. 152 (10 L. R. A. [N. S.] 989). There we set aside a judgment denying probate of the will, and ordered a new trial. The case has again been tried, and again a jury has disallowed the will. The proponents insist that the evidence did not

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justify the trial court in submitting to the jury either of the following questions:

(1) Was testator's belief that his son was illegitimate an insane delusion?
(2) Was the will the result of undue influence?
(3) Was testator a monomaniac upon the subject of spiritualism?

We decided on the former hearing that the testimony did warrant the submission to the jury of the second and third of the above questions. We regard that decision as authoritative, for the present record does not differ materially from the former record.

Upon that hearing we also said:

"There is evidence that testator's belief in contestant's illegitimacy which influenced the making of the will was produced by spiritualistic communications."

It would be fair to say that this falls short of deciding that this belief was an insane delusion, and we shall therefore treat the first of the questions raised by proponent as an open one and decide it now. There is no evidence in this case which has any legal tendency to prove testator's son to be illegitimate. Neither is there evidence which has any legal tendency to prove that his mother, Rowena Goff, testator's wife, was unchaste. There is, however, evidence that testator was informed that his wife committed adultery about the time contestant was conceived, and if this were all the testimony on the subject found in this record, we would have no hesitancy in saying that testator's belief that his son was illegitimate was one reached by weighing testimony, and therefore that it was not an insane delusion. But this is not all the testimony contained in the record. There is testimony which tends to prove that many of, if not all, the reports of his wife's infidelity originated in wicked and false slanders invented by testator himself. There was also testimony that before his son was conceived testator became an investigator of spiritualism, and that still later he became a spirit-

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ualistic monomaniac, incapable of reasoning where that subject was concerned. It may also be inferred from his acts and his declarations that many times, and particularly about the time the will was made, he received spiritualistic communications informing him that contestant was not his son, and the inference may also be drawn that he had such extraordinary confidence in these communications as to be impelled to follow them blindly and implicitly. From this testimony we think the jury should have been permitted, as they were, to draw the inference that testator gave no credit to the information he received tending to prove his wife's infidelity, and that his belief in his son's illegitimacy was not reached by weighing that testimony, but was merely an offspring of his monomania upon the subject of spiritualism. In short, we think that question 1, above stated, was properly submitted to the jury.

In this connection we will consider certain other objections relating to the subject under consideration. Testator obtained a divorce in the State of Indiana from contestant's mother in the year 1856. The trial court proceeded upon the assumption that the Indiana court was without jurisdiction, and its decree therefore void. Appellant contends that this is erroneous, and that the court had jurisdiction. The jurisdiction of the court is made to rest upon the sworn statement in the bill of complaint, sworn to by testator, that "he is now a resident of the said county and State." It is insisted that effect should be given to this statement because a statute of the State of Indiana makes it evidence that the court possessed jurisdiction. We must hold otherwise. The statute of Indiana prescribed a rule of evidence for the courts of that State. It has no effect in this State. See *Jones* v. *Railway Co.*, 80 Minn. 488 (49 L. R. A. 640). The undisputed evidence in the case proves that at this time testator resided in Michigan. The Indiana court was therefore without jurisdiction, and the contention under consideration is overruled. *People* v. *Dawell*, 25 Mich. 247.

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A deposition made by one William P. Bennett and filed in the Indiana case contained what purported to be a copy of a confession of adultery signed by Rowena Goff, contestant's mother. It is urged that, as said Rowena Goff had notice that this deposition was to be taken, her failure to deny the same furnishes evidence that it was true. We think otherwise. The controversy was being tried by a court which possessed no jurisdiction, and she was pursuing a course which she had a lawful right to pursue by paying no attention to the steps that were therein taken. Nothing can be taken against her, therefore, because she did not present her side of the controversy to that court.

Rulings upon the admission and exclusion of testimony. The trial court permitted contestant to introduce testimony tending to prove that Rowena Goff—testator's wife and contestant's mother—bore the reputation of a chaste woman before and during the time she cohabited with testator as his wife. The purpose for which this testimony was introduced was to prove the fact of chastity. Proponents' counsel objected to this testimony. We understand, and the trial court understood, by this objection that it is contended, not that the method adopted to prove chastity was an improper method (as to this see *Harris* v. *Neal*, ante, 57; 3 Wigmore on Evidence, § 1983), but that the fact of chastity was not involved in this suit. We think it was. Contestant could not prevail in his position that testator's belief in his illegitimacy was an insane delusion without convincing the jury that he was in fact his father's son. Involved in this was the question of his mother's chastity. It is true that it would not suffice merely to prove his mother's chastity. He must go further, and prove that testator's belief that his mother lacked chastity was an insane delusion, but nevertheless the fact of chastity was legitimately in issue. To convince the jury that testator's belief of his wife's lack of chastity was an insane delusion, it was necessary to convince them that she was in fact chaste. This does

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not mean that contestant must introduce affirmative testimony upon this subject. He might choose to rely upon the presumption of chastity which, in the absence of testimony, would obtain. See *People* v. *Brewer*, 27 Mich. 134; *Greenman* v. *O'Riley*, 144 Mich. 534. But his right to introduce such testimony cannot well be denied. It is also true in this case, as heretofore indicated, that there was no evidence of lack of chastity. This does not, however, afford ground for saying that affirmative proof of chastity was inadmissible. It merely proves that it was unnecessary.

Several witnesses were permitted to express the opinion that testator was a monomaniac. It is contended these witnesses did not testify to facts which entitled them to give their opinions. Most of this testimony came in without any exception, and the rulings admitting that testimony we cannot review. The rulings to which exceptions were taken are not open to the objection under consideration. That testimony came from witnesses who did testify to facts which entitled them to give their opinions under the rule repeatedly approved by this court. The point was made upon the argument that, when the capacity of a testator is assailed upon the ground that he is a monomaniac, the competency of a nonexpert witness to express an opinion is determined by a different rule than that which is applied when his capacity is assailed upon the ground of general incompetency. We do not feel called upon to pass upon this contention because it was not made in the brief. Nor do we think that it was made in the trial court.

Contestant introduced testimony alluded to in our former opinion tending to prove that testator entertained the belief that a departed spirit brought and gave to him a crisp new $5 bill. Proponents complain because an expert witness sworn by them was not permitted to explain this circumstance. They contend that this testimony was admissible as tending to prove that the belief of testator under consideration was rational from the stand-

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point of a spiritualist. We are bound to say, from the questions asked, and the colloquy that ensued between counsel and the court, that the excluded testimony would have had no such tendency. It would have only brought into the case a theory of spiritualism which, if believed by the jury, would have justified their discrediting contestant's witnesses who had sworn that testator entertained such belief. We are of the opinion that their credit was not to be tested by that standard, and that the trial court properly excluded the testimony.

Charge and refusal to charge. Each party to this litigation preferred many requests to charge. Tne learned trial judge marked such of those requests as he thought should be given to the jury, and, instead of himself reading them to the jury or making them a part of his general charge, he directed them to be read, and they were read by the counsel who prepared them. Complaint is made of this practice by proponents' counsel. We are bound to say that the practice is one which should not be resorted to except by consent of counsel or by reason of some exigency not shown to exist in this case. There are a great many reasons why the statement of law which the trial judge gives to the jury for their guidance should proceed directly from him. In that way, and only in that way, can there be any assurance that every principle of law given them for their guidance receives its due emphasis. It may be presumed, however, that in this case there was no impropriety in the practice. Counsel did not object nor except to it. The learned trial judge had a right to suppose that the practice met with their approval, and its adoption furnishes no ground for reversing the judgment.

Proponents' counsel preferred 128 requests to charge. Sixty-four of these requests were given. Complaint is made because of his refusal to give the remaining 64. Most of these requests were covered by the requests that were given or by the general charge of the court. Many of them contained an incorrect statement of law. Many of them were argumentative in nature. Some of them

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emphasized the importance of the testimony of particular witnesses. The court had at least a discretion to refuse to give those requests. See *Westchester Fire Ins. Co.* v. *Earle*, 33 Mich. 144. We think these general remarks sufficiently deal with all the complaints of proponents under consideration, save that which arises from their complaint of the trial court's refusal to give the following request:

"No declarations or statements made by John F. Goff before or after he made his will can be considered by you as any proof of undue influence, or that he was unduly influenced in making his will."

The vice of this request lies in the concluding language, "or that he was unduly influenced in making his will." It is unquestionably true (see *Zibble* v. *Zibble*, 131 Mich. 655) that the declarations of John F. Goff furnished no evidence that others exerted an undue influence, but those declarations might afford evidence of the effect of said influence upon his will. See, in this connection, *In re Townsend's Estate*, 122 Iowa, 246; *Potter* v. *Baldwin*, 133 Mass. 427. It would therefore have been incorrect to charge the jury that those declarations were no proof "that he was unduly influenced in making his will," and it follows that the request under consideration was properly refused.

Argument of counsel. It is contended that there was prejudicial error in the arguments of contestant's counsel. The statement of which most complaint is made, and the only statement which we think deserves attention, is that relating to the character of Rowena Goff for chastity. It was argued by contestant that her character for chastity was involved in this suit. Proponents contend that that character was not involved. We have already disposed of this question adversely to proponents' contention. Other complaints of the argument do not merit special attention. Some extravagant statements were made, but nothing brought to our attention by proper exceptions discloses reversible error.

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A great many other complaints are made, but of these it may be said that they are disposed of adversely to proponents under the reasoning contained in this opinion, or in the former opinion, or that they are answered by elementary principles of law, or by a proper construction of the record. They involve no question of importance to the profession, and disclose no reversible error.

The judgment is affirmed.

GRANT, C. J., and BLAIR, HOOKER, MOORE, and MCALVAY, JJ., concurred.

BRAASCH *v.* MICHIGAN STOVE CO.[1]

1. MASTER AND SERVANT—PERSONAL INJURIES—CHILD EMPLOYÉ—STATUTE—VIOLATION—KNOWLEDGE OF MASTER.

   That a master employing a boy under the age of 16 at a dangerous employment in violation of Act No. 113, Pub. Acts 1901, was deceived in respect to his age, to which deception the boy was a party, does not estop the boy from maintaining an action for damages resulting from a personal injury received in such employment. *Syneszewski* v. *Schmidt*, ante, 438, followed.

2. EVIDENCE — EXPERTS — OPINIONS — COMPETENCY — MATTERS OF GENERAL KNOWLEDGE—JUDICIAL NOTICE—HARMLESS ERROR.

   Though it was incompetent to call an expert to prove that an electric freight elevator was a place of danger to life and limb, that being a question of fact which the jury were as competent to decide without expert evidence as with it, the error in doing so was harmless in a case where plaintiff, a boy of 14, lost his foot in consequence of placing it over the edge of the floor of the elevator, since the court will judicially notice that a freight elevator is a place of danger to life and limb in the hands of an inexperienced boy of 14.

[1]Rehearing denied November 30, 1908.

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3. DAMAGES — PERSONAL INJURIES — EARNING POWER — INSTRUCTIONS.

In an action by a minor for personal injuries, instructions examined, and *held*, not open, when construed as a whole, to the objection that they permitted the jury to award damages for plaintiff's earning capacity for the period intervening the trial and the time when he should reach majority, a time during which his earnings belonged to his father.

4. SAME—EXCESSIVENESS.

An award of $4,000 to a boy of 14 for having his foot crushed between the floor of an elevator and the floor of the building, *held*, not so excessive as to require reversal or make it error to deny a new trial.

Error to Wayne; Brooke, J. Submitted June 12, 1908. (Docket No. 34.) Decided July 13, 1908.

Case by Edward A. Braasch, by next friend, against the Michigan Stove Company for personal injuries. There was judgment for plaintiff, and defendant brings error. Affirmed.

Bowen, Douglas, Whiting & Murfin, for appellant.

William Van Dyke (*James H. Pound*, of counsel), for appellee.

HOOKER, J. The defendant, a corporation engaged in the manufacture of stoves, employed the plaintiff and set him at work running an electric freight elevator in its factory. A few hours later he was injured, his foot being crushed between the elevator and a floor. It is obvious that this happened by reason of his foot being allowed to extend over the edge of the floor of the elevator, as it approached the fifth floor of the factory from below. He recovered upon this, the second trial of the cause, a verdict and judgment for $4,000, and a new trial having been denied, the defendant has appealed.

The plaintiff gave testimony tending to show that at the time of his employment he was 14 years and 8 months old, and it is claimed on his behalf that such employment

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was in violation of sections 2 and 5 of Act No. 113, Pub. Acts 1901, and conclusive evidence of defendant's negligence. The defendant produced testimony tending to show that application for work was made on behalf of the plaintiff, by his cousin, one Meyers, an employé of the defendant; that later he was told by defendant's superintendent to bring the plaintiff to the factory. He did so, and at the interview Callan, the superintendent, in plaintiff's presence, asked Meyers: "How old is he? Has he got papers?" and Meyers answered: "Why, no, he doesn't need any papers. He is as big as you (Callan) are;" that he (Callan) told plaintiff to stand up, which he did, and that he was at least two inches taller than Meyers. He was therefore employed, and soon after placed under the charge of a man then running the elevator, with directions to the latter to instruct him in his duties, and to stay with him until he had learned it all. It is defendant's contention that the superintendent was deceived by the statement of Meyers into the belief that the plaintiff was more than 16 years of age, and that the plaintiff was a party to such deception, and estopped from making a claim that the defendant was guilty of a violation of the statute. The learned circuit judge left the cause to the jury and a verdict for $4,000 followed.

The cause is before us for a second time. In our former decision (147 Mich. 676), we reversed the judgment previously rendered in favor of the defendant, holding that the plaintiff had a right to have the verdict of a jury upon the following questions, viz.:

"Whether the employment of a boy under 16 to run an electric freight elevator is within the prohibition of section 3, Act No. 113, Pub. Acts 1901, as endangering life or limb, is a question for the jury.

"In an action by a boy under 16 for injuries received in operating an electric freight elevator, evidence examined, and *held*, that whether he should have had other and further instructions as to the danger incident to his employment, and should have been warned of its dangers, were questions for the jury."

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Upon the present record it is claimed that the court erred in refusing to give defendant's 7th request, i. e.:

"It appears from the testimony of the witnesses Braasch, Meyers and Callan that it was represented to Callan, the superintendent of the Michigan Stove Company, that the plaintiff, Braasch, was of the age of 16 or over, and if you believe that Mr. Callan employed Braasch relying upon the statements made in Braasch's hearing, by Meyers, that he did not require any papers, then the defendant did not in any way violate the provisions of Act No. 113 of the Public Acts of 1901, in reference to the employment of persons under 16 years of age, and the plaintiff cannot recover."

It is urged that the record conclusively shows that the defendant was deceived in regard to the age of the plaintiff, and that he, the plaintiff, should therefore be estopped from claiming damages upon the ground of a violation of the statute. One who deliberately falsified regarding his age to get employment is not entitled to much sympathy, in a suit against the employer, whom he has deceived, in an action based upon the statute. It is said that he should be estopped from recovering on such a claim. We held the contrary in the case of *Syneszewski* v. *Schmidt*, ante, 438.

A witness was called by plaintiff's counsel, as an expert, to prove that a freight elevator was a place of danger to life and limb. Counsel truly say that this was a question which it was the province of the jury to decide, and there is force in the contention that it was not competent to call witnesses to decide it for them. We understand that this injury was not the result of any inherent and hidden danger involved in the use of the machine, but was the obvious consequence of placing a foot over the edge of the floor of the elevator, voluntarily or involuntarily. This was as apparent to a juror as anyone, and the jurors could decide that it was so, as well without the opinion of the expert as with it. We think the testimony was within the rule laid down in *Melzer* v. *Car Co.*, 76 Mich. 94, and other cases cited in appellant's brief.

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But this was harmless error, for we will take judicial notice that a freight elevator is a place of danger to life and limb in the hands of an inexperienced boy of 14 years. The legislature has seen fit to forbid the employment of such persons for the management of dangerous machinery, fixing the age limit at 16 years. An elevator, like many other machines, is a reasonably safe machine under proper management, but accidents are not infrequent. Any construction of the statute which does not take into account the inexperience and natural heedlessness of children overlooks an important consideration. Undoubtedly it was passed to protect children against accidents, which in adults might well be said to result from negligence on the part of the victim, but which in children would be largely due to a want of experience, or heedlessness, for which experience is ordinarily the only cure. Without implying that a child can never be chargeable with contributory negligence in such a case, it may well be said that all so-called heedlessness may not be negligence. But this may perhaps be thought a digression. The point of it all is that we feel justified in saying that the management of an elevator passing floors as this did, is an occupation dangerous, within the meaning of the statute, to the life and limb of a boy of 14 years of age. It is not a question of the obviousness of the danger, but whether the occupation is one attended with dangers which a child would not be competent, in view of childish habits and instincts, to understand or avoid. The case of *Allen* v. *Jakel*, 115 Mich. 484, was a case involving an obvious danger, but it was held that an increased obligation, growing out of the ignorance and inexperience of childhood, rested upon one who would employ a child. This did not involve a statute against child labor, and the case was a recognition of an increased duty of instruction growing out of immaturity of the employé. See, also, *Sterling* v. *Carbide Co.*, 142 Mich. 284, where we said that "the statute * * * clearly recognizes that a child under 16 years is immature in judgment."

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Error is assigned upon the following charge:

"He is entitled, further, gentlemen of the jury, to recover damages for his decreased earning capacity if you find from the evidence in this case and from your observation from the injured limb that during his lifetime his earning capacity will be decreased by reason of the injury."

It is said that this permitted the jury to award damages to his earning capacity for the period intervening the trial and the time when plaintiff should reach the age of 21 years, a period somewhat over a year, which counsel claim was a right belonging to his father and not to him, upon the theory that his father was entitled to his earnings for that time, no proof of emancipation being offered. From the charge itself we take the following:

"If you resolve all these questions, gentlemen of the jury, in favor of the plaintiff, you will then consider the question of damages. I charge you, *first*, as to what damages he cannot recover. He cannot recover for any medical attendance or doctor's bills, to start with. He cannot recover for any time lost during the time that he was ill. I think the testimony shows that there was about a year that he was unable to get work. He is an infant, and under the law his time at this time would belong to his father, and there is no evidence in the case that his father manumitted to him or gave him his own time, so that that element of damage is not in the case for your consideration. He is entitled to recover, gentlemen of the jury, if you find under my instructions that he is entitled to recover, he is entitled to recover for his pain and suffering, not alone what he has suffered in the past, but what you find he will suffer in the future as the direct and necessary result of the accident. He is entitled to recover for the inconvenience and the humiliation which you find that he will suffer by reason of his crippled condition, if you find that his condition will entail either inconvenience or humiliation in the future. Now, gentlemen of the jury, both of these elements of damage are elusive. It is hard to determine accurately what the plaintiff is entitled to for the value of that pain or suffering or inconvenience and humiliation. As I have said before, they can neither be

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weighed nor measured. They ought never to be oppressive, but they ought to be full and fair compensation for those elements. They must in the last analysis be referred to the exercise of the judgment of twelve honest men, intent only upon doing the right thing between these two parties.

"He is entitled further, gentlemen of the jury, to recover damages for his decreased earning capacity, if you find from the evidence in this case and from your observation from the injured limb, that during his lifetime his earning capacity will be decreased by reason of the injury. There is no testimony in the case tending to show that since the happening of the injury up to the present time, his earning capacity has been decreased. But I am still of the opinion that you may, viewing the foot and taking into consideration the condition in life of the plaintiff, that you are the judges as to whether or not such an injury will result in a decreased earning capacity through the life of this boy; and if you find that the injury is such a one as to decrease his capacity to earn a livelihood, then your verdict should include such a sum as will fairly compensate him for that decrease, if you find it to exist."

The jury were explicitly told that he could not recover for lost time while ill, and that his time during the year that he could not get work belonged to his father. But he afterwards allowed them to find damages through his lifetime if they should find that his earning capacity will be decreased, etc.

The defendant's counsel did not call attention to the question now raised in any request to charge, although plaintiff's 6th request plainly claimed damage for loss of earning capacity. Nor did they, when the charge was given, call attention to the omission to notice the period of a year or two between the trial and the time when he would reach his majority. Had they done so, no doubt the judge would have said to the jury expressly what he had impliedly said before as to failure to get work, that he had no right to recover for lost earning capacity prior to his majority. Under the former and fairer practice of requiring exceptions to be taken before the return of a verdict, the court and plaintiff would have been protected

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against errors of this kind, and the statute allowing assignments of error upon the charge, after judgment, and without exception, is productive of injustice, affording as it does the opportunity for raising points before us which have not been brought to the attention of the trial court. It certainly is not conducive to the administration of justice, that just and hard earned verdicts and judgments procured at large expense should be lost through the intentional or inadvertent omission of opposing counsel to carefully cover all points involved before the trial court and his right based on a recent statute to raise them later in this court. Thereby the plaintiff is made an insurer of the accuracy of all the instructions of the trial court, and the defendant is relieved from the necessity of bringing all points that he intends to rely on before the trial court. There is nothing in this case to indicate any intentional omission of counsel to raise this point before verdict. On the contrary, we have every reason to believe that their conduct of the case was eminently fair. What has been said is merely to call attention of the bar to the injustice of the existing statute eliminating exceptions to the charge, and the manifest injustice that has followed its enactment, in the many cases which we have been obliged to reverse upon comparatively unimportant points. We think, however, that the charge, when it is all read together, shows that the learned circuit judge intended that the jury should not award any damages for lost earnings during plaintiff's minority, and it would be a stupid juryman who would render a verdict for decreased earning capacity covering a period when the earnings if made would not belong to the plaintiff. He expressly told them that he could not recover for time already lost, whether from inability to get work or want of ability to work, for the reason that he was an infant during this time and his father had not emancipated him.

It is not unreasonable to presume that every citizen competent to act in the capacity of juror knows that a person is an infant and that his father is entitled to his services

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until he reaches the age of 21 years. We find nothing to indicate a claim to the contrary in this record, and we feel warranted in the conclusion that court, counsel and jurors must all have understood that recovery for increased earning capacity must commence when the plaintiff became his own master.

We are not convinced that the verdict was so excessive as to require a reversal, or that the court erred in denying a new trial.

The judgment is affirmed.

GRANT, C. J., and MOORE, CARPENTER, and MCALVAY, JJ., concurred.

HARRINGTON *v.* CALHOUN PROBATE JUDGE.

1. TRIAL—CONDUCT—TAMPERING WITH JURORS — DRAINS — ESTABLISHMENT.

   Where, on review of proceedings to establish a drain, it appears that the jury who found that the drain was a necessity and assessed the damages, while considering their verdict and looking over the lands to be taken, "accepted entertainment of, and were repeatedly treated to cigars by, certain of the petitioners for the drain and who were interested in its construction," and while the jury were taking their dinner at one of the petitioners, a lady who was waiting on them said: "The way to a man's heart is through his stomach," and inquired whether they would want stagnant water near their homes, the proceedings must be quashed.

2. SAME—WAIVER OF IRREGULARITIES—FAILURE TO OBJECT.

   Where the irregularities occurred on June 11th, the verdict was filed on the 13th, and the objections were made on the 14th, a waiver of the objections could not be inferred from failure to seasonably object, where relator's counsel did nothing to indicate his approval or his intent to waive objections, and merely maintained silence.

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Error to Calhoun; North, J. Submitted June 12, 1908. (Docket No. 86.) Decided July 13, 1908.

Certiorari by George Harrington and others against George W. Hamm, probate judge, and Edward D. Dickinson, drain commissioner of Calhoun county, to review proceedings for the establishment of a drain. There was judgment for respondents, and relators bring error. Reversed, and proceedings quashed.

Hatch & Page, for appellants.

Winsor & Miller, for appellee.

CARPENTER, J. We are called upon in this case to review proceedings for the establishment of a drain brought before the circuit court by writ of certiorari. Various irregularities are alleged. In our judgment we need consider but one. It appears by the record that the jury who found that the drain was a necessity, and who also assessed damages, while considering their verdict and looking over the lands to be taken, "accepted entertainment of, and were repeatedly treated to cigars by, certain of the petitioners for the drain and who were interested in its construction," and, while said jury were taking their dinner at one of the petitioners, a lady who was waiting on said jury said: "The way to a man's heart is through his stomach," and inquired whether they would want stagnant water near their homes. The circuit judge said:

"Such conduct would justify the setting aside of a verdict of the jury in ordinary proceedings at law, but the conditions surrounding the determination of such a matter as the proceeding in mind is quite different, and it does not seem to me that the court can say that the mere exchange of such courtesies as are indicated in this record unduly influenced the judgment of 12 men whose integrity and standing as citizens was passed upon by the relators' counsel at the time of their selection as jurors."

We cannot approve this reasoning. While a judge or juror is determining a controversy, he should accept no

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favors from a party interested therein. Such favors are usually extended for the purpose of improperly influencing his judgment, and, if he accepts them and decides in favor of the party extending them, he justly subjects himself to severe criticism. Judicial proceedings will become a mockery if such conduct is tolerated, for every suitor will be encouraged to compete in schemes of corruption. In *Detroit, etc., R. Co.* v. *Campbell*, 140 Mich. 384, a verdict in proceedings instituted by a railroad company to condemn land was set aside for just such conduct, and we said:

"Taking property by virtue of the right of eminent domain is a proceeding that ought to demand quite as careful oversight as the trial of any other case, for it deals with as important interests as any civil cause. * * * We do not know that the jurors were influenced in this case, but we are of the opinion that owners of land should not be subjected to such dangers, or be required to show affirmatively that they have suffered."

Several reasons are urged for saying that the case is not ruled by the *Campbell Case*. It is said that it was necessary for the jury to get their dinner while they were examining the route of the drain. This is doubtless true; but the slightest forethought would have provided for obtaining that dinner elsewhere than at the house of one of the petitioners and in some other manner than at his expense.

It is said that relators' counsel should have made an earlier objection to the misconduct of the jurors. The misconduct occurred on the 11th of June, when the jurors were making their view of the proposed drain. Their verdict was filed on the 13th of June. The objections were made on the 14th. They could not well have been made earlier. To sustain the contention in question, we must decide that counsel should have objected to the irregularities at the time they occurred. It might be sufficient to say that it is not to be inferred that certain of these irregularities of a serious nature were observed by counsel at the time they occurred. It is true, however, that he did

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know of some of them, and perhaps it may be inferred that as to these he did not immediately protest. But it may not be inferred that he did anything which indicated his approval or his intent to waive objections. It may be presumed that he maintained a dignified silence. And this was the proper course to take for a lawyer and a gentleman. And in taking it he did all that was necessary to preserve his clients' rights. It is said that he waived his objections because he accompanied the jury when they took dinner at the house of one of the petitioners. Whether this would amount to a waiver of the particular objection, viz., the objection that the jurors accepted this entertainment, is a point which we are not called upon to determine in this case. It certainly would not amount to a waiver of other objections, viz., that the jurors received other favors from petitioners—objections which require us to vacate the verdict.

The order of the circuit court will be reversed, and the proceedings quashed.

GRANT, C. J., and BLAIR, MOORE, and MCALVAY, JJ., concurred.

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LEWIS *v.* JACOBS.

1. CANCELLATION OF INSTRUMENTS—DEEDS—FRAUD—WHAT CONSTITUTES.

   Where defendant, the owner of an interest in certain lands, fraudulently induced his co-owner to believe he had found a purchaser for the lands, and that the property was less valuable than it was, and induced him to transfer his interest to a third party whom he represented to be acting for the purchaser, but who speedily transferred to defendant's wife, the transaction was fraudulent, and properly set aside.

2. FRAUD — MISREPRESENTATIONS — RELIANCE BY PARTY DEFRAUDED—DILIGENCE.

   A defrauded party does not owe to the party who defrauds him an obligation to use diligence to discover the fraud.

3. DEEDS—ACCEPTANCE—PRESUMPTIONS.

   Where a landowner conveyed the land to her agent for the purpose of facilitating the transaction by which they were defrauded, and on discovery of the fraud the agent repudiated the conveyance by which he transferred the land to defendant's agent, and reconveyed to his principal, the acceptance by the principal of her agent's deed of reconveyance will be presumed.

4. APPEAL AND ERROR—REVIEW—EXTENT—QUESTIONS NOT RAISED BELOW.

   Whether the testimony of an agent of a party since deceased was incompetent under section 10212, 3 Comp. Laws, as amended by Act No. 30, Pub. Acts 1903, will not be decided, where the objection was not made in the trial court.

5. SAME — BRIEFS — SUPPLEMENTAL BRIEFS — QUESTIONS CONSIDERED.

   Objections made in appellant's supplemental brief, not made in the original brief, will not be considered.

Appeal from Ontonagon; Cooper, J. Submitted June 16, 1908. (Docket No. 2.) Decided July 13, 1908.

Bill by William H. Lewis, trustee, against John H. Jacobs and others to set aside a deed on the ground of

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fraud. From a decree for complainant, defendants appeal. Affirmed.

Ball & Ball, for complainant.

M. J. Sherwood, for defendants.

CARPENTER, J. Decedent, Alice S. Hill, and defendant John H. Jacobs, were the owners of certain land and standing timber thereon situated in Ontonagon county in this State. Said Alice S. Hill owned an undivided three-fourths and said John H. Jacobs owned the remaining undivided one-fourth. Said Alice S. Hill resided in Washington, D. C. Said John H. Jacobs resided in the city of Marquette in this State. By correspondence said Jacobs suggested to Mrs. Hill that she join him in selling the timber on said land, saying that he had a man who would buy all of it except the hard wood for $2,500. Mrs. Hill thereafter sent her son, defendant James Marshall Hill, to Marquette to confer with defendant Jacobs. In order that he might have full power to act she executed and delivered to him a warranty deed of her title. After reaching Marquette and conferring with defendant Jacobs, said James Marshall Hill executed a deed conveying the undivided three-fourths of the timber on certain of said lands to the Marquette National Bank and delivered it to said bank. This he did believing that defendant Jacobs was also transferring his interest and that said bank was simply acting as the agent of a third person. Said Jacobs did not in fact transfer his interest, and the title acquired by the Marquette bank was through his agency speedily transferred to his wife. Shortly thereafter the Hills concluded that they had been defrauded. Said James Marshall Hill re-conveyed his interest to his mother, Alice S. Hill, deceased, and defendant Jacobs was notified that the transaction was repudiated on the ground of fraud. In a few days thereafter said Alice S. Hill died testate leaving a will making the complainant her trustee. Subsequently, this suit in equity was instituted praying a re-

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conveyance of said property. The case was heard upon testimony taken in open court and a decree rendered for complainant. Defendants appeal. The principal question is one of fact. Was the conveyance procured by the fraud of Jacobs? We have no hesitancy in saying that it was. He fraudulently induced said James Marshall Hill to believe that he was uniting with him in the sale and he also fraudulently induced him to believe that the property was less valuable than in fact it was. It is urged that diligence on the part of Hill would have discovered the fraud. This is answered by our own decision of *Smith* v. *Werkheiser*, 152 Mich. 177, wherein we say:

"A defrauded party does not owe to the party who defrauds him an obligation to use diligence to discover the fraud."

It is urged that there is no evidence that Mrs. Hill ever accepted the deed of reconveyance executed by her son James Marshall Hill. We answer this by saying that the law supplies this omission. Her acceptance is presumed. See *Kaufman* v. *State Savings Bank*, 151 Mich. 65; *Bangs* v. *Browne*, 149 Mich. 478; and *Thatcher* v. *St. Andrew's Church*, 37 Mich. 264.

It is urged as Mrs. Jacobs died before this suit was tried that the testimony of James Marshall Hill was incompetent under that provision of section 10212, 3 Comp. Laws, as amended by Act No. 30 of the Public Acts of 1903, reading as follows:

"No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract against the legal representatives or heirs of such decedent, unless he shall be called by such heirs or legal representatives."

We do not feel called upon in this case to determine whether this provision rendered incompetent the testimony of James Marshall Hill. That objection was not made in

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the trial court and cannot for the first time be made in this court.

We do not consider other objections made in the supplemental brief and not made in the original brief.

The decree is affirmed.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred

TAYLOR v. RICHARDS.

1. WILLS — CONSTRUCTION — ESTATES CREATED — VESTED OR CONTINGENT.

   In determining whether an estate created by a will is vested or contingent, the authorities chiefly agree in favoring the vesting of interests and in treating future interests as vested where there is any present interest in the income of the property.

2. SAME—DEVISE IN TRUST.

   Where testator devised land to his grandson upon his reaching the age of 25 years, the control of the same to remain in the hands of the executors until that time, the income to be used for his support and education, and the land or its proceeds to be conveyed to him upon his reaching the prescribed age, if he should show himself worthy and of steady habits, the entire estate, under section 9263, 3 Comp. Laws, passed to the devisees, and, the executors having no beneficial interest, the entire beneficial interest passed to the grandson, the contingency applying merely to the time when he should come into full enjoyment of the estate.

3. TRUSTS—TERMINATION—STATUTES.

   Where testator devised the entire estate in certain lands to his executors and his grandson, the executors taking no beneficial interest, but merely an estate in trust for the benefici-

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ary, and the beneficiary died before the happening of the contingency upon which he was to receive the legal title, the purpose of the trust ceased, and under section 8851, 3 Comp. Laws, the estate of the trustee ceased, and the estate descended to the beneficiary's heirs.

Error to Genesee; Wisner, J. Submitted June 17, 1908. (Docket No. 49.) Decided July 13, 1908.

George B. Taylor and Lena E. Caldwell, administrators of the estate of William H. Davis, deceased, petitioned the probate court for the distribution of a trust fund under the last will and testament of William Davis, deceased. The petition was granted, and Sarah Richards, an heir of William Davis, appealed to the circuit court. There was judgment for petitioners, and defendant brings error. Affirmed.

William V. Smith, for appellant.

Brennan & Cook and *Black & Roberts*, for appellees.

William Davis died March 18, 1884, leaving a will dated June 23, 1883, and a codicil thereto, dated January 14, 1884. These were duly admitted to probate. His will contained the following provisions:

"I give, devise and bequeath to William H. Davis, the son of said Elmer A. Davis, the farm now owned by me in the town of Davison, being the south half of the southwest quarter and twenty acres off the south part of the north half of the southwest quarter of section ten (10), and the south half of the southeast quarter and the northwest quarter of the southeast quarter of section nine (9), all in town seven (7) north, range eight (8) east, in Davison, containing two hundred and twenty acres. Also all the farming tools, implements and stock on said farm with authority to my executors to sell such farm stock and tools and convert same into money for the use and benefit of said William H. Davis. The rents, profits and income of said farm and farm stock and tools to be used and appropriated for the support and education of said William H. Davis, and for improvements, repairs, fencing upon said

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farm, the possession of said farm and farm stock, etc., or of the proceeds of a sale thereof to go to said William H. Davis upon his arriving of age of twenty-one years. * * *

"I hereby authorize and empower my executors to sell and convey any of my real estate whenever in their judgment they shall think best to do so and to keep, use and apply the proceeds as hereinbefore provided, the title thereto to go as above provided. It is further provided that in case said William H. Davis, son of Elmer A. Davis, shall become dissipated or a spendthrift, then my executors are hereby authorized and empowered to withhold any or all of the legacies and devises hereinbefore made for his benefit from him, or to such extent as they in their judgment may think best. And in case said Elmer A. Davis should also become dissipated or a spendthrift, then and in that case a like power to withhold the control or possession of the bequests and devises made for his benefit is hereby given to my said executors."

His codicil contained the following provision:

"The farm in town of Davison mentioned in the fourth item of my said will devised to William H. Davis, son of said Elmer A. Davis, I hereby devise to said William H. Davis, upon his arriving at the age of twenty-five years, instead of at once, as in said will provided, the control of same to remain in the hands of my executors until he arrives at that age, the use and income thereof to be appropriated for the support and education as in said will provided, the title thereto to remain in my executors until he arrives at twenty-five years of age, when, if he shall show himself worthy and of steady habits, my said executors shall, if they deem it safe and for his best interest, transfer and convey said farm in Davison to him, said William H. Davis, or in case they shall have previously sold said farm then they shall transfer to said William H. Davis the proceeds of any such sale of said farm, if they shall so deem it safe and for his best interest. The other provisions of said item fourth of said will not inconsistent herewith to remain in force and effect."

The testator left surviving a widow, who elected to take her dower and distributive portion under the statute. Her dower in the Davison farm above referred to was set off and admeasured to her use during her life. She afterwards joined with the executors in the sale of the farm,

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and of the proceeds the sum of $3,600 was set aside for her use, and the income of the same paid to her during her lifetime. She died April 11, 1906. William H. Davis a son of Elmer, named in said will, was between the age of five and six years when testator died. At the time he reached the age of 25 years, he was an inmate of the Michigan reformatory at Ionia upon conviction of the crime of burglary. He never married, and died August 2, 1906. The petitioners are administrators of his estate and his heirs. They bring this suit to secure the fund of $3,600 above mentioned. Appellant defends this suit as the heir of William Davis. The question in the suit is whether under the will William H. Davis had such a title in the Davison farm as to descend to his heirs. The trial court held that he had and gave judgment in petitioners' favor.

CARPENTER, J. (*after stating the facts*). Did William H. Davis have a descendible estate in the Davison farm? He did if the estate in that farm vested. Did it vest? This depends on the construction of the will, particularly on the construction of the following language found in the second item of the codicil:

"The title thereto to remain in my executors until he arrives at twenty-five years of age, when, if he shall show himself worthy and of steady habits, my said executors shall, if they deem it safe and for his best interest, transfer and convey said farm * * * to said William H. Davis, or in case they shall have previously sold said farm then they shall transfer to said William H. Davis the proceeds * * * if they shall so deem it safe and for his best interest."

Does the contingency referred to in this language apply to the gift itself or merely to the time when William H. Davis shall come into its full enjoyment? If the contingency applies to the gift itself, then William H. Davis had no vested interest. If it applies merely to the time he should come into its full enjoyment, then it did vest. *Toms* v. *Williams*, 41 Mich. 552; *McCarty* v.

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Fish, 87 Mich. 56. Did the contingency in this case apply to the gift itself, or did it merely apply to the time when William H. Davis should come into possession of the farm? This question should be answered by a construction of the will and a construction in accordance with the testator's obvious intention. Did the testator intend that William H. Davis should have no interest in the land unless, at the time he reached the age of 25 years, he should prove himself to the executors to be "worthy and of steady habits?" Whoever answers this question in the affirmative must assert that the executors had authority to withhold from William H. Davis the income of this property after he reached the age of 25 years should he prove himself unworthy and of unsteady habits. Appellant's counsel contends that they had. He insists that testator intended, in the event of William H. Davis proving himself unworthy, that the trust of the executors should cease and the property be returned to testator's heirs. Is he right? The thought of the testator is not expressed in words of precise legal terminology. For instance, there is no formal bequest of any interest in the Davison farm to the executors of testator. And yet it is clear that testator intended those executors to have a trust estate therein. They are given not merely authority to sell said farm, but its custody and control, at least until William H. Davis reaches the age of 25 years. For whom do they hold this trust estate? Manifestly, for William H. Davis, and for no one else. He is to receive the entire income during the entire time that they hold said estate, and, until he reaches the age of 25 years, he is to receive this income no matter what his personal habits may be. Did the testator intend that at that time he should receive less than the income? The will says that, when William H. Davis "arrives at 25 years of age * * * if he shows himself worthy and of steady habits," he shall receive more than the income, viz., he shall receive the possession and control of the property. This does not indicate that, if the contingency does not occur,

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William H. Davis shall be deprived of the income theretofore enjoyed by him. May we presume that he so intended? To answer this in the affirmative requires us to presume that it was the testator's intention that in that contingency the trust should cease, and the farm should pass not as a devise under the will, but as an inheritance outside of the will to testator's heirs at law. This is a most violent presumption, and, as hereafter indicated, opposed to law. It was testator's purpose to devote the farm—and by that I mean his entire interest in the farm—to the benefit of William H. Davis. Until the latter reached his maturity and proved his trustworthiness, he was to have the income and be deprived of the possession and control. The provision for withholding possession and control was obviously dictated by testator's regard for the devisee's personal interests. It was inserted through fear that the devisee might squander the principal, and thus deprive himself of the means of support furnished by the income. Its purpose was to more certainly insure to the devisee the enjoyment of his devise, and not to deprive him of it altogether. It would thwart that purpose to hold that the will authorized the executors to divert the income, if the devisee proved himself unworthy and of unsteady habits. And the court should not place that construction upon the will, unless required to do so by some rule of law. There is no such rule of law. On the contrary, the rules of law applicable to this case sustain the construction indicated in this opinion. We refer to those rules.

Says Chief Justice CAMPBELL, in *Toms* v. *Williams*, 41 Mich. 565:

"While there has been some variance among the authorities concerning the legal distinctions between vested and contingent estates, they chiefly agree *first* in favoring the vesting of interests, and *second* in treating future interests as vested where there is any present interest in the income of the property."

Section 9263, 3 Comp. Laws, reads:

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"Every devise of lands in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate."

The construction insisted upon by the appellant in this case is prohibited by the above section, for, according to that construction, the will of testator has conveyed only a fraction of his estate in this land. It is clear to us that the testator intended by his will to bequeath his entire estate in the Davison farm. We must therefore hold that by the will the entire estate passed to the devisees therein named. Those devisees are William H. Davis and testator's executors. To the executors was bequeathed no beneficial interest. The devise to them was merely in trust. To William H. Davis was devised the entire beneficial interest. He was the sole beneficiary of the trust. When the purpose of the trust ceased, the estate of the trustee ceased. Section 8851, 3 Comp. Laws. That purpose ceased when William H. Davis died, and, he being then the owner of the entire beneficial interest, the entire estate descended to his heirs.

The judgment is affirmed.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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SWEET *v.* SMITH.

153 674
157 558

MANDAMUS—PROPRIETY—ENFORCEMENT OF LAW—OFFICIAL DUTY.

Mandamus on the relation of private relators is not available to compel the police officers of Detroit to prohibit Sunday baseball playing in the city, where it does not appear that the grievance of relators is any other than that sustained by other citizens of the city, or that the attorney general has refused to act, since, the grievance being purely a public one, redress should be sought by the people's public agents, and not by private intervention.

Certiorari to Wayne; Rohnert, Brooke, Mandell, Murphy, and Hosmer, JJ. Submitted July 7, 1908. (Calendar No. 22,947½.) Decided July 13, 1908.

Mandamus by John Sweet and others to compel Fred W. Smith, police commissioner, and John Downey, superintendent of police, to enforce certain laws. There was an order denying an order to show cause, and relators apply for a writ of certiorari. Application denied.

James H. Pound, for relators.

PER CURIAM. We are asked to review an order of the circuit court for the county of Wayne denying a mandamus, prayed for by relator and others, compelling the respondent "to execute and enforce all the laws pertaining to the preservation of the Sabbath, or the first day of the week, at the baseball park of the Detroit Club." The purpose of the proceeding was to prohibit Sunday baseball playing in the city of Detroit. It does not appear that the grievance of the petitioners is any other than that sustained by other citizens of the city of Detroit. Neither does it appear that the attorney general of the State has refused to take action in the matter. Under these circumstances, petitioners have no right to relief. The griev-

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ance complained of is purely a public grievance, and redress should have been sought by the people's public agents, and not by private intervention. See *People, ex rel. Russell*, v. *Inspector and Agent of State Prison*, 4 Mich. 187; *Miller* v. *Grandy*, 13 Mich. 540; *People, ex rel. Delbridge*, v. *Green*, 29 Mich. 121; *People, ex rel. McBride*, v. *Board of Sup'rs of Kent Co.*, 38 Mich. 422; *Steffes* v. *Moran*, 68 Mich. 291; *Smith* v. *City of Saginaw*, 81 Mich. 123.

The decision of the circuit court was clearly correct, and we decline to review it in this court.

PEOPLE v. LAMB.[1]

1. CONSPIRACY—INFORMATION—SUFFICIENCY.
   An information which charges a conspiracy "to commit extortion of and from" a named person is sufficient, notwithstanding the failure to use the words "the offense of" or "the crime of" immediately preceding the word "extortion," since the word "extortion" includes within it the idea of crime as much as though the conspiracy were alleged to be to commit any other well known crime. HOOKER, MOORE, and CARPENTER, JJ., dissenting.

2. SAME—EXTORTION—EVIDENCE—SUFFICIENCY.
   In a prosecution of an attorney and a justice of the peace for conspiracy to commit extortion, evidence examined, and *held*, sufficient to support a conviction for having demanded and received of the defendant in a bastardy case grossly excessive costs. HOOKER, MOORE, and CARPENTER, JJ., dissenting.

Exceptions before judgment from Montcalm; Wolcott,

[1] Rehearing denied September 10, 1908.

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J., presiding. Submitted November 15, 1907. (Docket No. 175.) Decided July 13, 1908.

Frank Lamb and Floyd Winter were convicted of a conspiracy to commit the crime of extortion. Affirmed.

R. A. Hawley and *Rarden & Rarden*, for appellants.

Earl F. Phelps, Prosecuting Attorney, for the people.

BLAIR, J. In my opinion the information in this case is sufficient to support a conviction. The information charges a conspiracy "to commit extortion of and from one Albert Eastman," etc. I do not think that the failure of the pleader to use the words "the offense of" or "the crime of" immediately preceding the word "extortion" affects the substance of the charge. The word "extortion" includes within it the idea of the crime as much so as though the conspiracy were alleged to be "to commit burglary." I think this information is within the rule laid down by this court in the case of *People* v. *Butler*, 111 Mich. 483, and the cases there cited. In that case the information charged that the respondents "did combine, conspire, confederate, and agree together by divers false pretenses, subtle means and devices to attain and acquire unto themselves of and from the county of Wayne a sum of money, to wit, the sum of $50, of the value of $50, of the money of it, the said county of Wayne, and to cheat and defraud it, the said county of Wayne, thereof, to the great damage of it, the said county of Wayne." It was said by the court:

"It is the claim of the respondent that this information should have been quashed,—*First*, because it states no offense known to the law; *second*, because it contains no allegations of the means by which respondents conspired to cheat and defraud. The claim of the respondent cannot be sustained. The case is ruled by *People* v. *Richards*, 1 Mich. 216; *People* v. *Clark*, 10 Mich. 310; *People* v. *Winslow*, 39 Mich. 505; *People* v. *Petheram*, 64 Mich. 252; *People* v. *Watson*, 75 Mich. 582; *People* v. *Dyer*, 79 Mich. 480."

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I am also of the opinion that there was sufficient evidence to take the question to the jury as to whether the conspiracy involved the extortion of illegal fees from Eastman.

Defendant Winter testified, in proceedings conducted by a bar committee appointed by the court for that purpose, among other things, as follows:

"I talked with Eastman afterwards, and among other things I said to him that, if it was my sister, he could not settle the matter for $10,000. We talked back and forth, and I don't remember who spoke of $200, but finally one of us did speak of $200, and Mr. Eastman said he would give the $200 and it was so arranged. I remember that in this talk some one said something about Eastman going over the road if the matter was not settled up. Either I or Mr. Lamb used these words, I think. * * * At the time, Mr. Eastman, Mr. Hendry, and myself were in my office closing up this matter, and, at the time these mortgages were given, something was said about the costs. Mr. Lamb had said there were some costs attached, and I talked with Lamb over the phone, and asked what the costs were, and he told me that they were $10. I do not know whether or not Mr. Eastman paid this $10. I did not see Eastman hand the $10 to Hendry."

Florence Parm testified:

"After we got down to the office, he [Winter] told my mother that, if she wanted the money, she would have to sign her name; said all he could get out of Albert Eastman was $25, and he had to scare that out of him."

John Hendry, the constable who served the warrant, testified:

"I took Eastman to Lamb's office when I arrested him. Mr. Lamb read the complaint to Eastman, and, before he hardly got through reading it, Eastman said: 'Yes; I am guilty. What does it cost to settle it.' Mr. Lamb told him that he could not settle it. He says, 'It is something I cannot settle here;' but he says: 'I understand Mr. Winter is her attorney. Perhaps it might be adjusted some way'—something like that. * * * I think Mr. Eastman asked Lamb where Winter's office was, and finally Lamb said to him, 'If the officer will

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permit, I will go with you,' and I said to them, 'Go on if you want to,' and they went out. * * * About the time this transaction was closed Mr. Winter said to Eastman: 'You understand you are to pay the costs.' Eastman said, 'Yes,' and went right down in his pocket in a hurry, seemed to be anxious to get his money out to pay it, and asked how much the costs were, and Winter asked me how much the costs were, and I told him I did not know, and suggested that he would have to ask Lamb. I gave him the number of Lamb's phone and Winter called him and said to him: 'Those costs were $10, weren't they, in that case?' And he stepped down from the phone, and said: 'Yes; that is what they are.' Eastman gave me the $10, and after supper I went up to the justice office and gave the $10 to Mr. Lamb, and he gave me $5 of it for my fees, and I came away. I gave Lamb the same $5 (10) Eastman gave to me. I afterwards talked with Mr. Lamb in regard to this matter over at Stanton, and Mr. Lamb told me that he and Winter had divided the money between them. That is all. This was on the streets of Stanton. He said to me: 'They might as well own up; it was all off anyway'—and that Mr. Winter had told the whole circumstance just as it was, and he said, 'He and I divided the money between us, and that was all there was of it.' * * * After this matter was closed up and we were all together there in Winter's office, something was said about the costs. I did not know what the costs were, and Winter did not know. I suggested to Winter that he call up Lamb and find out, and Winter finally telephoned to Lamb. I don't know all the talk they had over the phone, but finally Winter said, 'Then the costs are $10;' but I don't know what Lamb said about it, of course. I don't remember all that was said over the phone by Winter at the time."

Eastman testified:

"I went back to Winter's office, and my wife went with me. I understood that this $175 that I was getting from Belknap and paying to Winter was to settle up with Mrs. Parm and the girl. I understood, also, at the time, that I was to pay the costs in addition to the $175, and that was the way I understood it right along. Before any money was paid over to Mrs. Parm, this question of costs was brought up; that is, as to how much the costs were. It was while I was there in the office, and the check was

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brought down and laid on the table. Before we got through and got the thing fixed up, something was said about the amount of the costs; how much the costs were. I think that John Hendry first inquired about the costs. John Hendry said that I had got to pay the costs. He made the statement there that I had got to pay the costs. I think I asked him how much the costs were, and I think Hendry asked Winter, and Winter said that he did not know how much the costs were. Then somebody suggested that they call up Lamb and find out how much they were, and the reason that Lamb was called up was that none there knew how much the costs were. So Mr. Winter called up Mr. Lamb. When he got Mr. Lamb on the phone, he says: 'Lamb, how much are the costs?' Of course, I did not hear what Lamb replied, and finally Winter turned around and told me the costs were $10, and I paid the $10 to Hendry. * * *

"*Q.* You have stated you paid these $10 costs?

"*A.* Yes, sir.

"*Q.* Who first spoke to you about the matter?

"*A.* About the costs?

"*Q.* Who told you to pay the costs or that you had got to pay them?

"*A.* I may be mixed up. I know one of them asked me. I think it was or might have been Hendry.

"*Q.* What is your best recollection as to whether it was Hendry or Mr. Winter?

"*A.* I said Mr. Winter once, didn't I?

"*Q.* What is your best recollection now in regard to it? Was it Mr. Hendry or Mr. Winter?

"*A.* I won't say, I can't prove it.

"*Q.* No; I didn't ask you to say for certain, but what is your best recollection in regard to it now, as to whether it was Mr. Winter or Mr. Hendry told you that you had got to pay the costs?

"*A.* I think it was Hendry said so."

It appears from the testimony that Eastman understood all the time that he was to pay the costs in addition to the $175, and about the time the transaction was closed respondent Winter called Eastman's attention to this, according to the testimony of Hendry, saying, "You understand you are to pay the costs," to which Eastman said, "Yes." It further appears from Winter's own testimony

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that prior to the meeting at his office to close the matters up "Mr. Lamb had said there was some costs attached," etc.

From this testimony the jury might fairly infer that part of the original scheme was that Eastman was to pay not only the $175, but also the costs of the proceedings before the justice, and that it was part of the original understanding between the respondents that they should get for themselves as much as possible over and above the amount which Mrs. Parm would accept and as much as they could get in excess of the legal costs. This view is, I think, borne out by the fact that, according to the testimony of Hendry, Winter did not ask Lamb what the costs were, but said to him, "Those costs were $10, weren't they, in that case?" indicating an agreement theretofore between Winter and Lamb as to the amount of costs which they would demand, and which both of them knew was grossly excessive. So far as these questions are concerned, which are the only questions discussed in the opinion now before the court, I think the rulings of the circuit judge should be sustained.

I have examined the record with reference to the other assignments of error relative to the rulings of the court upon the admission of testimony, the refusal of requests to charge, and to portions of the charge as given, and am of the opinion that they are not well founded. The jury were distinctly instructed that a conviction could not be had for obtaining the $175, but only for obtaining the $10 of costs. The charge correctly stated the claims of the parties and the rules of law applicable to the case, and the rights of the respondents were carefully protected.

The conviction is affirmed, and the record remanded for further proceedings in accordance with the law.

GRANT, C. J., and MONTGOMERY, OSTRANDER, and MCALVAY, JJ., concurred with BLAIR, J.

HOOKER, J. (*dissenting*). The defendants were con-

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victed of the offense of conspiracy upon an information, the substance of which follows:

"That Frank Lamb and Floyd Winter unlawfully, falsely, deceitfully, and fraudulently did combine, conspire, confederate, and agree together to commit extortion of and from one Albert Eastman, and the said Frank Lamb and the said Floyd Winter did on the said 5th day of March, A. D. 1907, in the said city of Greenville, in said county, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement between them, unlawfully, corruptly, deceitfully, and extorsively extort, receive, and take of and from the said Albert Eastman the sum of one hundred and eighty-five dollars, of the value of one hundred and eighty-five dollars, to the great damage of the said Albert Eastman, and to the evil example of all others."

We are asked to review the trial upon writ of error sued out in behalf of both defendants.

Several questions are raised, the most far-reaching of which are two, viz.: Did the information state, and did the testimony tend to prove, an offense? There was no serious dispute about the facts. They were, in substance, that Lamb, who was a justice of the peace, was approached by a Mrs. Parm and her daughter, a girl of under 16, who complained that she was enceinte, and charged one Eastman with the paternity of her prospective offspring. They wished to have Eastman arrested and made to pay them something for the disgrace and the support of the child, should one be born. She signed a complaint, and a warrant for bastardy was issued, and Eastman was arrested. Winter, the other defendant, was a lawyer. After the Parms left his office, Lamb telephoned to Winter, asking him to come to his (Lamb's) office. Winter said, "What is the trouble?" and Lamb replied, "Nothing, only there is something on, something good." Winter complied, and Lamb told him what had occurred, and suggested that he act as attorney for Mrs. Parm and her daughter against Eastman, stating that they would be satisfied with $25 or $35, and suggesting that the balance

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that they could get from Eastman could be divided equally between them. This was agreed to, and Lamb gave Winter a note to Mrs. Parm. The note and the interview that followed, as stated by Winter, were as follows:

"Eastman was arrested and brought before Lamb just after noon on the same day, and, when the warrant was read to him, he said he was guilty and wanted to settle; he saying at the time: 'Yes; I am guilty. What does it cost to settle it?' No one had previously said anything to him about settling the matter. Lamb told him that he [Lamb] could not settle it, but suggested that Winter was Mrs. Parm's attorney, and that he better go to him. Eastman not knowing where Winter's office was, Lamb went with him to Winter's office, leaving the officer at Lamb's office."

Eastman paid Winter $175, of which $25 was paid to Mrs. Parm. She gave the following receipt to Winter:

"GREENVILLE, MICHIGAN, March 5, '07.

"I hereby agree to accept $25 in full of all claims which I may have against Albert Eastman for bastardy with my daughter.

[Signed] "CLARA PARM."

It appeared from the testimony of Winter and others that, at the time of the adjustment of the matter in Winter's office, there was talk about costs. Hendry, the officer who made the arrest, testified:

"About the time this transaction was closed Mr. Winter said to Eastman: 'You understand you are to pay the costs.' Eastman said, 'Yes,' and went right down in his pocket in a hurry; seemed to be anxious to get his money out to pay it, and asked how much the costs were, and Winter asked me how much the costs were, and I told him I did not know, and suggested that he would have to ask Lamb. I gave him the number of Lamb's phone, and Winter called him and said to him: 'Those costs were $10, weren't they, in that case?' And he stepped down from the phone and said: 'Yes; that is what they are.' Eastman gave me the $10, and after supper I went up to the justice's office and gave the $10 to Lamb, and he gave me $5 of it for my fees, and I came away. I gave Lamb the $5 (10) Eastman gave to me. * * * I did not

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know what the costs were, and Winter did not know. I suggested to Winter that he call up Lamb and find out, and Winter finally telephoned to Lamb. I don't know all the talk they had over the phone, but finally Winter said: 'Then the costs are $10.' But I don't know what Lamb said about it, of course. I don't remember all that was said over the phone by Winter at the time."

Eastman testified:

"That he was not sure whether Winter or Hendry first spoke about the costs, but thought it was Hendry. I understood all the time that I was to pay the costs in addition to the $175, and that was the way I understood it right along. Before any money was paid over to Mrs. Parm, this question of costs was brought up; that is, as to how much the costs were. It was while I was there in the office, and the check was brought down and laid on the table. Before we got through and got the thing fixed up, something was said about the amount of the costs; how much the costs were. I think that John Hendry first inquired about the costs. John Hendry said that I had got to pay the costs. He made the statement there that I had got to pay the costs. I think I asked him how much the costs were, and I think Hendry asked Winter, and Winter said that he did not know how much the costs were. Then somebody suggested that they call up Lamb, and find out how much they were, and the reason that Lamb was called up was that none there knew how much the costs were. So Mr. Winter called up Mr. Lamb. When he got Mr. Lamb on the phone, he says: 'Lamb, how much are the costs?' Of course, I did not hear what Lamb replied, and finally Winter turned around and told me the costs were $10, and I paid the $10 to Hendry."

There was no testimony indicating that the subject of costs or fees was ever discussed by the parties except in the talk by telephone, except that of Winter as to talk at the time of the settlement, when it was said there were some costs, and the statement by Winter that Lamb had said that there were some costs attached which does not indicate a conspiracy relating to costs.

Counsel for defendants claim: This record shows that the defendants entered into an arrangement, whereby

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Lamb should aid Winter in getting the consent of Mrs. Parm and her daughter to allow Winter to represent them in a settlement of the matter with Eastman, that the case should be settled for as large a sum as practicable, and that Mrs. Parm should be induced to accept a small sum, and that the defendants would divide the excess between themselves. There is not a syllable of evidence that they had any talk or thought of extorting illegal official fees from anyone. The claim of the prosecution being that the offense was a conspiracy to extort official fees, it appears to have been sustained only upon the theory that the money received and divided must be treated (so far at least as concerns the portion received by Justice Lamb) as excessive compensation in the way of payment for official duties, and the learned circuit judge allowed the jury to so find. The evidence shows that the only charge made for official action was $10 called costs, and this was paid by Eastman as such. If there is any evidence that the sum was excessive, it is affirmatively and conclusively proved that it was never the subject of a conspiracy. It was not even divided with Winter.

The subject of the conspiracy was the amount that should be obtained from Eastman for the complainant for a wrong committed by him, which the complainant might lawfully settle, and a part of which it was contemplated that Winter should obtain for his services, and which he should divide with the justice for sending the case to him, and possibly such assistance as Lamb might give him, which was not the subject of official fees and which nothing indicates that the parties understood to be so. We are of the opinion that the court erred in this instruction.

The information. It remains to inquire whether there is occasion for a new trial. Had this information charged that the defendants conspired "to commit *the offense* of extortion," or to commit specified acts which would, if committed, constitute extortion under any of our statutes (see 3 Comp. Laws, §§ 11240, 11241, 11242, 11326), it is possible that it might be sustained under the rule stated in

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Alderman v. *People*, 4 Mich. 432, and *People* v. *Butler*, 111 Mich. 483, and cases there cited. It does neither, though it does allege that the defendants conspired to "commit extortion." The *Case of Alderman* was recognized as an extreme case, though it rests upon a necessity, viz., that others cannot know, and perhaps even conspirators may not know, upon whom or by what means the contemplated offense is expected to be or may be practiced, and therefore it is sufficient where the offense has a well-settled meaning at common law, so that by describing it by the term by which it is generally known the nature of the offense contemplated by the conspirators is clearly indicated to describe it by such term. If the omission of the words "offense of" is permissible without destroying the validity of the information—which I might assent to, did the case turn upon that question alone—I am nevertheless impressed that, inasmuch as the information shows that the conspiracy was carried out "*in pursuance of* and *according to the* conspiracy, combination, confederacy, and agreement between them, the defendants," to do a thing which in and of itself as therein described, would not necessarily be extortion when done, the first general allegation is so qualified as to make the charge uncertain. I have had doubts whether this language should not be held to so qualify the first statement as to render it doubtful whether the conspiracy was to extort unlawful official fees, or to unlawfully, fraudulently, and deceitfully extort money (not official fees) from Eastman, by duress or fraud or by some other means, not necessarily criminal. It is as though it charged specifically in the first instance a conspiracy to do the very acts which the instrument mentions as being done in "pursuance of, and accordance with the conspiracy, combination, confederacy, and agreement," and which do not justify an inference of taking pretended official fees by an officer or anyone else, and which, standing alone, would be insufficient. Under the rule of strict construction applicable to informations, this language is the more particular description of what the

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parties conspired to do, and must be taken in preference to the general description, extortion, at least to the extent of rendering uncertain the former allegation. It limits the general language, to say the least, and introduces an element of uncertainty not usually tolerated in informations. Whereas in this case there is not a clear, positive, and unqualified charge that the conspiracy was to commit an offense having a well-known and not uncertain meaning, the case is not necessarily covered by the rule invoked.

I am therefore of the opinion that the judgment should be reversed and defendants discharged.

MOORE and CARPENTER, JJ., concurred with HOOKER, J.

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CHICAGO & KALAMAZOO TERMINAL RAILROAD CO. *v.* GRAND RAPIDS & INDIANA RAILWAY CO.

1. EMINENT DOMAIN—RAILROADS—CONDEMNATION PROCEEDINGS—REVIEW—CERTIORARI.

The determination of the court upon the issue which may be raised in conformity with the provisions of section 6245, 2 Comp. Laws, may be reviewed by certiorari, whatever the form in which cause is shown of record; but, the proceedings being summary, and dilatory proceedings not being favored, it is not contemplated that cause shall be shown by a series of special pleadings, the decision upon each of which may be separately reviewed.

2. SAME—RAILROADS—PROPERTY SUBJECT.

The court declines to say that a railroad company may not own land, other than that excepted in section 6242, 2 Comp. Laws, which is subject to be condemned by another railroad company for use as a way for its tracks.

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8. SAME—PLEADINGS—PETITION—SUFFICIENCY.

A petition by a railroad company, to condemn lands belonging to another railroad company, which avers the facts required by section 6242, 2 Comp. Laws, is sufficient, it being the duty of the landowner to bring before the court the facts relied upon to defeat the showing, rather than the duty of the petitioner to negative, or state by way of exclusion and inclusion, every fact and theory upon which the owner might rely to show the property to be exempt.

Certiorari to Kalamazoo; Adams, J. Submitted May 12, 1908. (Docket No. 133.) Decided July 13, 1908.

Condemnation proceedings by the Chicago & Kalamazoo Terminal Railroad Company against the Grand Rapids & Indiana Railway Company. There was an order overruling a demurrer to the petition, and respondent brings certiorari. Affirmed.

Alfred J. Mills, for petitioner.

James H. Campbell, for respondent.

The petition in the condemnation proceeding, after describing the land sought to be condemned, contains the following averments:

"That said real estate is required for public purposes and uses, to wit: For the purposes of your petitioner's incorporation and railway, in constructing, operating, and building its said railway and the appurtenances thereof, and as and for a right of way for its said railway, and for the main line thereof, and also for building thereon and maintaining and operating such additional tracks as are necessary and convenient for the construction, maintenance, and accommodation of your petitioner's railway, and the taking thereof is necessary for public use. * * *

"*Seventh.* That said piece or parcel of land and property is not any part of the track or right of way of the Grand Rapids & Indiana Railway Company, a corporation which is incorporated and exists under and by virtue of the laws of the State of Michigan, and also under and by virtue of the laws of the State of Indiana, as your petitioner is informed and believes, which is the owner thereof, nor is it any part of the track or right of way of any

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other railroad company within the intent and meaning of section 17 of the general railroad laws (Laws 1873, Act No. 198) of the State of Michigan."

The demurrer to the petition is here set out at length:

"The Grand Rapids & Indiana Railway Company, respondent, says that the petition in this proceeding is not sufficient in law, and does not state facts or set forth a case which gives the court jurisdiction to proceed under said petition to appoint commissioners, as therein prayed, for the reasons:

"(1) There is no provision, in any statute of Michigan, which authorizes proceedings for the condemnation of the land of one railroad company for the use of another railroad company upon the facts, or for the purposes, set forth in said petition.

"(2) The statute, the general railroad law of this State, being Act No. 198, Laws 1873, as amended, allows proceedings for the condemnation of land owned by one railroad company for use by another in only three cases, viz.: (*a*) For the purposes of a crossing; (*b*) for depot or terminal facilities; (*c*) of a roadbed, or part thereof, which has for five years remained in an unfinished condition, and without having the ties and iron thereon.

"(3) The petition does not seek to acquire the land described therein, and sought to be condemned for a crossing, nor for depot or terminal facilities, and the same is not shown to be an unfinished or unused roadbed.

"(4) The petition does not show that the land described therein, and sought to be condemned, is subject to condemnation under Act No. 198, Laws 1873, as amended, by the petitioner, for the purposes and in the manner set forth therein."

The briefs and arguments present two questions. The first involves the right to review, in this proceeding, the order of the circuit court, which merely overrules the demurrer, and gives the respondent in the condemnation proceeding the opportunity to answer the petition. The second involves the merits of the demurrant's case, which rests upon the proposition that the petition does not, by averment of necessary facts, show that the land sought to be acquired is subject to condemnation for the purpose stated in the petition.

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OSTRANDER, J. (*after stating the facts*). The right to review, by certiorari, the determination of the court upon the issue which may be raised in conformity with the provisions of 2 Comp. Laws, § 6245, is settled by prior decisions of this court. *U. S. Gypsum Co.* v. *Kent Circuit Judge*, 150 Mich. 668. But it is not contemplated by the statute that cause shall be shown by a series of special pleadings, the decision upon each of which may be separately reviewed. As has been repeatedly indicated by this court, the proceeding is not strictly judicial in character—is summary—and dilatory proceedings are not favored. The form in which cause is shown of record is not very material, so long as objections, however predicated, supposed to relate to the preliminary issue, are presented.

Counsel for plaintiff in certiorari says that a question is presented which involves "consideration and determination of the extent to which the property of one railroad company may be taken by another by condemnation, under Michigan statutes, what land may be so taken, and for what purposes, the rights which may be acquired, as title or easement, and the construction of" 2 Comp. Laws, § 6242, as amended by Act No. 266, Pub. Acts 1899. It is only in the most limited sense that any of these matters are involved. General, applicable, principles are not in doubt. This court said, in *Battle Creek, etc., R. Co.* v. *Tiffany*, 99 Mich. 471, 474:

"It is elementary that the power to condemn land is in the State, and can be exercised only in such cases and by such methods as the legislature may authorize; also, that land once taken for and applied to a public use is not usually subject to condemnation under general laws, but only where the power is granted by express language or necessary implication. Again, railroads are permitted to condemn lands for their use because the use is considered a public one, and land procured for railroad purposes by purchase is as much for a public use as when it is condemned; all being upon a common footing, and not subject to a subsequent exercise of the right of eminent do-

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main, unless authorized by an enactment of the legislature."

In *Cincinnati, etc., R. Co.* v. *Bay City, etc., R. Co.*, 106 Mich. 473, one of the objections made was:

"It appears that this is an attempt to condemn the property of another railway, under circumstances unauthorized by statute."

It was argued, upon an appeal from the award, that the petition and this objection raised a jurisdictional question, to be settled before proceeding to an award. It was said that section 3331, 3 How. Stat., which is 2 Comp. Laws, § 6242, above referred to,

"Subjects railroad property to condemnation, excepting (under some circumstances) the track and right of way. The argument is made that this is an attempt to condemn the track and right of way; and, if this appeared from the petition and answer, it might be necessary to try the question. But it does not, and we think the circuit judge was right in declining to allow the question to be raised."

Undoubtedly, the petition must affirmatively state facts necessary to give the court jurisdiction. In view of these decisions we are not prepared to say that a railroad company may not own land, other than that excepted in section 6242, which is subject to be condemned by another railroad company for use as a way for its tracks. The petition, apparently, avers such facts as are required by the provisions of this section. We think it better practice, in such cases, to require the owner of the land to bring before the court the facts relied upon to defeat the proceeding, rather than to require the petition to negative, or to state by way of exclusion and inclusion, every fact and theory which the owner might rely upon to show the property to be exempt.

The order of the court below is affirmed.

GRANT, C. J., and BLAIR, MONTGOMERY, and HOOKER, JJ., concurred.

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KELLY v. SPROUL.

1. LIMITATION OF ACTIONS—ACCRUAL—PRINCIPAL AND SURETY—CONTRIBUTION.

   A surety is not protected against contribution by the failure of his co-surety to make payment until after the statute of limitations has run against their joint obligation, which obligation has been kept alive as against him by a valid judgment in favor of the obligee; since the right of action for contribution does not accrue until after payment has been made.

2. SAME—STATUTES—APPLICATION.

   Sections 9734, 9742, 3 Comp. Laws, limiting the time within which actions may be brought in certain cases, have no application to an action for contribution between sureties.

Error to Kent; Perkins, J. Submitted June 15, 1908. (Docket No. 97.) Decided July 13, 1908.

Assumpsit by Timothy Kelly, administrator of the estate of Patrick Kelly, deceased, against Robert Sproul for money paid. There was judgment for plaintiff, and defendant brings error. Affirmed.

Carroll & Nichols, for appellant.

Doyle & McKenna, for appellee.

HOOKER, J. The finding of facts in this case shows that in 1893, Anna A. Grady was complainant, and Frank T. Warrell defendant, in summary proceedings then pending in the circuit court for Kent county. Being defeated, complainant Grady removed the cause to this court, filing the statutory bond required in such cases, dated November 18, 1893. Patrick Kelly and the defendant in this action were her sureties upon the bond. The judgment was affirmed (*Grady* v. *Warrell*, 105 Mich. 310) and a judgment for costs against Grady was entered in

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this court on May 21, 1895, and a few days later costs were taxed, which she never paid.

On September 30, 1903, Patrick Kelly died and during that year Timothy Kelly was appointed administrator of his estate. A claim was filed in probate court by J. Tome Preston, Warrell's assignee, on March 17, 1904, against the estate of Kelly, for $196.57, based on the appeal bond aforesaid dated November 18, 1893, and the judgment of the Supreme Court rendered May 21, 1895.

On June 21, 1904, it was allowed at the sum of $180.93 as a valid claim against the estate of Kelly, and on January 7, 1907, Timothy Kelly, administrator, compromised the claim, paying on behalf of the estate $175. On January 17th he brought this action for contribution against Sproul, Kelly's co-surety on the bond, before a justice of the peace, declaring on the common counts. The defendant pleaded the general issue accompanied by notice that the cause of action had not accrued within 10 years from the time when the action was commenced. Afterwards by amendment he claimed the benefit of the six-year statute of limitations. The defendant appealed to the circuit court, where, on a trial before the court, plaintiff recovered a judgment on findings for $87.50.

The record shows that the allowance of the claim against the estate of Patrick Kelly was 9 years and 1 month after the rendition of the judgment by the Supreme Court, and payment was made 11 years, 7 months and 16 days after filing of the remittitur in the circuit court. This case was begun 10 days later. The defendant has brought the case here on writ of error.

It presents the question whether a surety is protected against contribution by the failure of his co-surety to make payment until after the statute has run against their joint obligation, which obligation has been kept alive, as against him, by a valid judgment in favor of the obligee. The authorities are believed to be nearly unanimous in sustaining the right of action in such a case upon the theory that the right of action for contribution does not

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accrue until payment is made. In addition to cases cited by counsel, a discussion of the question will be found in 1 Brandt on Suretyship and Guaranty (3d Ed.), §§ 320, 321; 7 Am. & Eng. Enc. Law (2d Ed.), pp. 340, 341, and notes.

Counsel for the appellant cite certain Michigan statutes, claiming that they have changed the rule for this State. 3 Comp. Laws, §§ 9734, 9742. We are of the opinion that they have no application to such a case as this.

The judgment is affirmed.

MONTGOMERY, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

ANDERSON v. PENDL.

REPLEVIN — DEFENDANT'S POSSESSION — NATURE — QUESTION FOR JURY—DEMAND—NECESSITY.

In an action of replevin for a span of horses in the possession of B., claimed by plaintiff to have been lent to A. with an agreement for their return and subsequent sale to him, evidence examined, and *held*, to present an issue of fact for the jury, since if B.'s version was true he bought the horses of plaintiff on an agreement made by A., acting as his agent, and was not only entitled to their possession under the contract of sale, but, the horses having come lawfully into his possession, he was entitled to a demand before having them taken from him on the writ.

Error to Newaygo; Palmer, J. Submitted June 16, 1908. (Docket No. 84.) Decided July 13, 1908.

Replevin by Thomas A. Anderson against Peter Pendl.

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There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Reversed.

Cogger & Broomfield, for appellant.

John G. Anderson, for appellee.

HOOKER, J. The plaintiff brought replevin for a span of horses which at the time of the issue of the writ were in the custody of the defendant, Peter Pendl. He claims that he had made an agreement with Paul Pendl, the brother of Peter, that he would sell to him (Paul) this team for $200; that he had advertised the team for sale on the 11th of May, and that whatever price he was forced to pay at the auction he should have the team for $200; that Paul wanted to use the horses at once, and he loaned them to him with the understanding that he would return them upon the 11th. He claims to have agreed to take a note that should be acceptable to one Gannon, a banker, who was to be clerk at the auction. Paul Pendl turned the horses over to his brother Peter, from whom they were replevied after demand was made on Paul.

Defendant denies that his possession was unlawful, and claims that he bought the horses on an agreement made by his brother, acting for him, and the plaintiff, by which he was to give his own and his brother's note for $200 and the horses were at once delivered, the note to be given later to suit plaintiff's convenience; that there was no arrangement by which the horses were loaned, or were to be returned on the 11th; that on the 11th the plaintiff refused to accept either a note as agreed, or other security offered, and the property was replevied without demand. The learned circuit judge directed a verdict for plaintiff, and the defendant has appealed.

These claims raised an issue of fact for the jury. If defendant's version was true, he was in lawful possession of the property, and the replevin would not lie, for two reasons:

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First. No demand was made upon him for them before suit.

Second. He had a right to the possession as against the plaintiff at that time, under the contract of sale.

It was therefore error to direct a verdict for the plaintiff. The case should have been left to the jury.

The judgment is reversed and a new trial ordered.

MONTGOMERY, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

CLARK v. ULRICH.

In re MORE'S ESTATE.

1. SAVING QUESTIONS FOR REVIEW — EVIDENCE — OBJECTION — NECESSITY.

   Objections to the admission of the testimony of a physician, on the ground of privilege, not raised on the trial, will not be considered on appeal.

2. WILLS—MENTAL INCAPACITY—UNDUE INFLUENCE—EVIDENCE — SUFFICIENCY.

   In a proceeding to probate a will, contested on the grounds of mental incapacity and undue influence, evidence examined, and *held*, to be insufficient to take the questions to the jury, and that the court should have directed a verdict for proponents.

3. TRIAL—MISCONDUCT OF COUNSEL.

   It is improper for counsel to make statements of fact not in evidence during the examination of witnesses; for if counsel possesses any information relative to the facts, which he thinks should go to the jury, he should be sworn as a witness and subject himself to the rules governing the taking of testimony.

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Error to Oakland; Hosmer, J., presiding. Submitted June 17, 1908. (Docket No. 61.) Decided July 13, 1908.

Adelia Clark and Thomas Hislop, executor, presented for probate the last will and testament of Huldah More, deceased. The will was allowed in the probate court, and Helen Ulrich and others appealed to the circuit court. There was judgment for contestants, and proponents bring error. Reversed.

Edward E. Kane and *Ignatius J. Salliotte*, for appellants.

Brennan, Donnelly & Van De Mark (*James H. Lynch*, of counsel), for appellees.

MOORE, J. This is a contest over a will, the material parts of which read as follows:

"1st. I direct the payment of my debts and funeral expenses and the erection of a suitable monument over my grave, out of my estate; said monument not to exceed in cost the sum of one hundred dollars, and I further direct that the sum of one thousand dollars be set aside, out of my estate, and invested and the income derived therefrom devoted to the care and ornamentation of my grave and burial lot.

"2d. I give and bequeath to my granddaughter, Helen Krumhorn, of Vernon, in the State of Michigan, the sum of three hundred dollars, and direct that the said sum shall be invested by the executors of my will, hereinafter named, in such manner as to them shall seem best, until she attains the age of twenty-one years, and in case of her death before she attains the age of twenty-one years, leaving issue surviving her, then to her said issue, and in case of her death before she attains the age of twenty-one years, without issue surviving her, then I direct that said sum, and the income thereof, shall go to my residuary legatee hereinafter named.

"3d. I give and bequeath to my grandson, Eddie H. Garrison, also of Vernon, in the State of Michigan, the sum of two hundred dollars, the same to be paid within three months after my death, and in case of his death before the time above mentioned for the payment of said

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two hundred dollars, then I direct the same to be paid to his legal heirs.

"4th. I give and bequeath to my daughter Fidelia Whittaker, of the city of Detroit, aforesaid, the sum of three hundred dollars, the same to be paid within three months after my death, and in case of her death before the time above mentioned for the payment of said three hundred dollars, then I direct the same to be paid to her legal heirs.

"5th. I give and bequeath to my granddaughter Helen More, daughter of my deceased son, Charles W. More, and now of Waterloo, in the State of New York, the sum of two hundred dollars, and direct that the same shall be invested by the executors of my will herein named, in such manner as they think best, until she arrives at the age of twenty-one years, and in case of her death before she attains the age of twenty-one years, leaving issue surviving her, then to her said issue, and in case of her death before she attains the age of twenty-one years, leaving no issue surviving her, then I direct the same to go to her sister, Katie More, hereinafter named.

"6th. I give and bequeath to my granddaughter Katie More, also daughter of my deceased son, Charles W. More, and now of Waterloo, in the State of New York, the sum of two hundred dollars, and direct that the same shall be invested by the executors of my will herein named, in such manner as they think best until she arrives at the age of twenty-one years, and in case of her death before she attains the age of twenty-one years leaving issue surviving her, then to her said issue, and in case of her death before she attains the age of twenty-one years, leaving no issue surviving her, then I direct the same to go to her sister, Helen More, hereinbefore named.

"7th. In case of the death of both said Helen More and said Katie More, before either of them attains the age of twenty-one years, without issue surviving either of them, then and in such case, I direct that the aforesaid sums bequeathed to them shall go to my residuary legatee hereinafter named.

"8th. I give, devise and bequeath to William H. Clark, of Vernon, in the State of Michigan, and to his heirs forever, the north thirty-three feet of Outlot Nineteen, and the south half of Outlot Eighteen of the Guoin Farm, in the city of Detroit, Wayne county, Michigan, the same being the land owned by me on the east side of

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Russell street, and north of Superior street, when said Superior street is extended east of Russell street and south of Willis avenue, in said city of Detroit, subject, however, to the payment of the said sum of one thousand dollars, set apart for the care and ornamentation of my grave and burial lot, and also subject to the payment of the legacies in my will hereinbefore named.

"9th. I give, devise and bequeath to my daughter, Adelia Clark, of Vernon, in the State of Michigan, and her heirs forever, all other and remaining property, both real and personal, of every name and nature, including my homestead and all moneys on deposit in banks, government bonds, and all other property belonging to me."

The will was allowed in probate court, an appeal was taken to the circuit court. The contestants are four of the children of the Fidelia Whittaker, named as a beneficiary in the will, who died in 1902, and two grandchildren, who at the time the will was made were named therein as Katie More and Helen More, the children of Charles W. More, deceased, Nellie Schmidt and E. H. Garrison, daughter and son of Sarah M. More who died in 1887. Nellie Schmidt is the person whose name at the time the will was made was Helen Krumhorn.

After the testimony was in, counsel asked the trial court to give the following request:

"*First.* The jury are instructed that there is no evidence in this case showing that Huldah More lacked testamentary capacity on July 19, 1889, when she made this will or that this will was the result of any undue influence exercised over Huldah More by Adelia Clark or William Clark, or either of them, or by anyone else by or on behalf of them or either of them, and they must therefore find a verdict that the will in question is the valid, legal will of Huldah More."

The court was also requested that in case he refused to give this request, to give certain other requests which were preferred by counsel and to submit four special questions to the jury. The trial judge refused to give the request above quoted. He also declined to give some of the other requests, and to submit one of the special questions. He

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gave some of the other requests and submitted to the jury three of the special questions, which were answered by the jury against proponent's contention. The will was disallowed by the jury.

The proponents then moved the court for a new trial, because the verdict was against the weight of the evidence upon the question of mental competency, also upon the question of undue influence and for several other reasons. On overruling the motion for a new trial, the trial judge said:

"If there were nothing more in this case than the question of mental competency, I should have no hesitation in granting a new trial on the ground that the verdict was against the weight of evidence, but I cannot say there was not sufficient evidence to warrant the jury in finding the will was procured by undue influence."

The record is a voluminous one and there are a great many assignments of error. Every word of the record has been carefully read by the writer of this opinion, but it will not be necessary to set out in detail what it contains. The important question in the case is whether it should have been submitted to the jury at all. The will was made in 1889, when Huldah More was 78 years of age. She died in 1904, when she was 93 years of age. She left an estate of about $23,000 to $25,000 which consisted chiefly of Detroit real estate, and $8,000 of deposits in two banks in Detroit. William S. More, the husband of Huldah More, died in 1875. He was a market gardener. Previous to his death for a number of years he and his wife lived on and worked a tract of land on Russell street between Willis and Alexandrine avenues in Detroit. Just before the husband died he deeded to each of his five children one acre of land out of the above mentioned tract. The rest was deeded to his wife, Huldah More. Mrs. More continued the business of market gardening with the aid of hired help, she doing much of the work herself, for about fourteen years after her husband's death. After that she grew vegetables for her own use

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and was a grower of flowers, which she sold. This continued until 1899, when she met with a severe accident while on a visit to her daughter Adelia, who lived at Vernon, in this State, which resulted in a broken hip. Until the time of this accident, with the advice of her counsel and the aid of hired help, she managed her property and transacted all her business herself.

William and Huldah More had a son whose name was Charles W. More; he was married in 1869; his wife left him under circumstances which will be referred to later. He was the father of two of the contestants, Helen Ulrich and Katherine More. He was granted a decree of divorce from his wife in 1885. He was a very bright man but was given to dissipation. After his wife left him, taking with her the children, he made his home with his mother until his death in 1887. The evidence discloses he died as the result of dissipation. Charles W. More left a personal estate of about $800. His mother was appointed first special and then general administratrix of his estate, and duly administered it to the satisfaction of the probate court.

Thomas Hislop, an attorney at law, was acquainted with Charles W. More in his lifetime and acted as the legal adviser of Mrs. More when she was managing the estate of her son. In the early part of July, 1889, Mrs. More called at the office of Mr. Hislop, alone, and told him she desired to make a will, and furnished him the data from which to draw a will. From this data Mr. Hislop drew the will and informed Mrs. More it was ready for her signature. On July 19, 1889, Mrs. More came to the office of Mr. Hislop and the will as prepared was read over to her. She discovered that Mr. Hislop had misunderstood the name of one of her grandchildren, Helen Krumhorn, and the name was corrected at her suggestion. Mr. Kane, an attorney at law, and the late W. M. Lillibridge, who later became circuit judge, were called in as witnesses, and in their presence Mrs. More executed the will, Mr. Kane and Mr. Lillibridge signing as witnesses.

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Upon the hearing the deposition of Mr. Lillibridge was read in evidence. He expressed the opinion that Mrs. More was entirely competent to make the will. Mr. Kane and Mr. Hislop were both sworn upon the trial, and both were very positive in their statement that Mrs. More was competent to make the will. After the will was executed it was left with Mr. Hislop for several years, at the expiration of which time Mrs. More called at his office and got the will, saying she thought it would be safer in her private box in the safety vault of one of the banks where she did business, where it was found after her death, with her other papers.

The record discloses that in 1898 she negotiated a sale of part of her real estate, advising with her counsel, for $8,500. She received a down payment of $4,000 which she herself counted, fixed the terms and time of payment of the balance, executed a contract for the balance and later a deed. She had litigation with the city, appeared as a witness before committees of the common council, was complainant in an injunction bill, sworn to by herself, against the city, prosecuted litigation against it successfully, and made deeds to the city and others, after her will was made. She kept bank accounts and was frequently making deposits and withdrawals, and when she died there was standing in her name deposits amounting to more than $8,000.

Reference has been made to the fact that Charles W. More and his wife separated prior to 1885, when he obtained his divorce. His divorced wife was a witness in this case on the part of the contestants. Much of her testimony was immaterial, as it related to what occurred between her children and her husband. She testified that she was advised by Huldah More to leave her husband and "There was no disagreement between me and Huldah More during the time of my married life, we always visited back and forth," and that Huldah More told her Mrs. Clark thought she ought to deed back to her husband the land he had deeded to her, and that Mrs. More told her

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upon another occasion that she could not help her then for the kindness she had shown her, but told her how she was going to dispose of her property among all the children. On the cross-examination she testified, among other things:

"I got the deed of the house and lot from my husband about two years after I was married and it was probably five or six years after that that Huldah More told me she wanted me to deed it back to my husband. My husband felt very much hurt because I did not deed it back and asked me to deed it back and I refused. His mother thought that I ought to deed it back. Mrs. More had been trying to get me to deed back the house and lot to my husband for perhaps a couple of years and I had constantly refused to do so and never did deed it back. Huldah More asked me several times to deed the house and lot back to Charles and showed considerable feeling about it. She felt hard because I refused to do it. I never talked with Adelia Clark on that subject at all, nor about taking my children and going home to New York before I left my husband. I have no knowledge of Adelia Clark's feeling in regard to my deeding this property back to my husband, except what Huldah More told me, and she told me just once that Mrs. Clark thought I ought to do so. It was just after Mrs. More came back from Vernon, after her fall, and that was in 1890 or 1889, that she told me that she could not help me then for the kindness I had shown her and told me what she was going to do with her property. I cannot tell the year that she returned after her fall."

Whatever else this testimony shows, it does show most clearly that Mrs. Huldah More thought her son Charles W. More had been greatly wronged by his wife when she procured a deed from him of his house and lot, and refused to deed it back.

We have already spoken of Fidelia More, Sarah More, and Charles W. More. The youngest child, Alfred More, was never married and died in 1877. The oldest daughter, Adelia, married Mr. Clark, and they moved to Vernon in 1855, and lived there until Mr. Clark's death in 1897, and Mrs. Clark lived there at the time of the trial. Huldah More was fond of her oldest daughter and visited her

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occasionally, and it was while on a visit to her that Mrs. More was hurt. The record also discloses that Mrs. Clark made it a point to visit her mother upon her birthdays and at holiday time when she could.

Mrs. Clark's testimony was taken and appears in the record; she swore she never attempted to influence her mother in the making of the will, or the disposition of her property, and that she had no knowledge of the will or its contents until her mother's death. It is claimed that her testimony is contradictory in relation to her having a key to the box in the safety vaults, but there is no conduct shown upon her part that is inconsistent with the conduct of a loving daughter to her aged mother. She received visits from her and paid visits to her, and indicated an interest in the condition of her household, but there is nothing in her conduct in that regard that should be the subject of adverse criticism.

After the death of her son, Charles W., Huldah More lived alone with her hired help, except for the period from 1891 to December, 1896, when Nellie Schmidt lived with her, during which time Mrs. More gave Nellie a piano. It is claimed that Mrs. Clark advised her mother not to have Nellie come to live with her. The same witness said Mrs. Clark assigned as a reason that it would make too much work for her. Nellie at this time was about ten years old. Whatever Mrs. Clark may have said, it is apparent that it did not prevent Huldah More from having her grandchild with her, for, as stated above, she lived with her grandmother for about five years.

We come back to the question, Was there evidence which ought to have taken the case to the jury that Mrs. More was incompetent to make the will in July, 1889? Two doctors who had attended Mrs. More were sworn as witnesses. It is now said their testimony should not be considered, as it was privileged. This objection was not made in the court below and we decline to discuss it now. *In re Mansbach's Estate*, 150 Mich. 348.

One of the doctors said she was suffering from anæmia,

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hysteria, partial hemiplegia and arteriosclerosis, and that these disorders would affect her mental capacity, when the following occurred:

"*The Court:* What peculiarities of mind did she exhibit at that time and circumstances?

"*A.* Well, one thing, she would talk about the amount of money she had in the bank, and another time she would talk about a certain granddaughter and her son, and whatever she talked about she seemed to be enthusiastic about it; she seemed to be full of impression. * * *

"The man Kraft worked for her a long time. At one time she would think him a lovely man; she didn't know what she would do if he was not in her employ and was full of enthusiasm about him; then another time she would find fault with him, she didn't know what to do about it. One time she would like him and then she would find fault with him. Every time I would come to her she would talk on some subject, one time one thing, another time another, but whatever she talked about, she seemed to be so full of enthusiasm, fully worked up upon it. Her eyesight was bad.

"*Q.* Now, doctor, after having read Exhibit 'B,' which purports to be the last will and testament of Huldah More, you may state whether or not, from your knowledge, at the time that the will was made, on the 19th day of July, 1889, she was in your opinion mentally competent to execute and plan this document?"

This was objected to, but the doctor was permitted to answer: "I should say that she certainly was not." On cross-examination he testified that he commenced the study of medicine at the Detroit College of Medicine in 1887, and was studying in that college in the fall of 1889, and graduated from the Michigan College of Medicine in 1892, and that when he first prescribed for Mrs. More he was a mere student, but said he had studied medicine in Canada, that he considered himself an expert practitioner before he graduated, and that he was testifying as an expert. He further said:

"She had anæmia, and as a result the brain was suffering in proportion. Any person suffering from cerebral anæmia is incompetent to make any will; I stick to that."

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It further appeared, upon the cross-examination, that Mrs. More settled with him from time to time and insisted upon having a receipt each time.

The other doctor was called two or three times in consultation with the doctor whose testimony we have referred to. He also testified that he saw her frequently up to the time when she was hurt. The following is the substance of his direct testimony:

"I do not remember the cause of my first seeing her in 1889. No, I do not remember when I first saw her. I know I saw her with Dr. Castell. I could not say how often I saw her from that until 1900. Sometimes I would see her quite often, sometimes maybe it would be a month or two months without seeing her. * * *

"*The Court:* In the year 1889 at the time you first saw her?

"*A.* I would not like to say, your honor; I do not remember the date. I might not have seen her in 1889, possibly. I do not think it is hardly probable. I think I saw her in 1889. I looked up my books, I took my books, I saw them a few days ago. I can bring them with me, but I think in 1889 I got some calls upon her, but whenever they were, if they were in 1889 or 1890, then I had my opinion.

"Well, she was a lady 80 odd years old at that time and suffering from physical infirmities, physical condition that all people do at that age, with corresponding mental weakness. She had certain well-defined physical and mental conditions that made her at that time a partial invalid. She had a small heart, what we call an atrophied heart; that is, a heart not as large as it should be, and that gave her the condition we call anæmia, poor blood supply to different parts. She had stomach and intestinal trouble, bladder trouble. She had certain nervous troubles, as palsy—that is, when she would walk she would tremble; her arms, hands and lower limbs would tremble. She had some trouble with her hearing; it was defective and her eyesight was defective and she had certain weakness of the brain. * * *

"*Q.* What manifestations were there of mental weakness in her condition at the time you first saw her? * * *

"*A.* Well, several. She would complain of her head

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aching—that she could not think; told me she could not remember and I have in giving her medicine told her how, in writing up a prescription to give to her for her medicine. I have not only told her how it was to be taken, and my directions I made as simple as possible, but I have even written them down and when I gave the medicine out of my case, I wrote it down on paper and left it there with the medicine on it—and she would forget how to take that medicine or she would take much more than I had ordered and she would do other things along the same line. For instance, one medicine which was to be taken at night she would take it in the daytime and when I would give her medicine to sleep, she complained of being unable to sleep and when I would give her directions about sitting in the—she gave me a history of the sun affecting her. She had not had a typical sunstroke, but the sun had affected her several times, by her history, and my directions to her were to keep out of the sun in the summer time; to keep in the shade and, if she did go out, to wear a sunbonnet or tie something wet inside of it to protect her head.

"At one particular time she told me she was obliged to go down town, said she was going and I coaxed her and begged her not to go down town, because it was in the middle of summer, and she had to go for some reason and I advised her then to have her attorney take care of the matter but she would not do it and I went so far as to send my carriage for her and take her and Mrs. Clark down street. She would have one opinion one day and maybe in a week she would change that. She would want to take medicine too fast at certain times and other times she would not want to take it as often as I thought was necessary. She would have her likes and dislikes of people, she would like a person today and maybe the next day you would go there she would not like that person, that same individual. And other times she insisted on my having my horse kept there on pasture in her lot.

"She had trouble with her eyes and I think I had her prepared to have her eye fixed, to have an eye specialist see her, several times. She had a cataract on one eye, I don't remember which it was, and I gave her medicine to relieve her of some symptoms she had that were due to that eye trouble, and I gave her medicine to prepare the eye for operation and she had been partially prepared for the operation several times and yet never had it operated upon. * * *

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"*Q.* Now, doctor, having read the document known as Exhibit 'B,' which purports to be the last will and testament of Huldah More, state whether or not in your opinion, derived from your observations of this woman, she was mentally capable to comprehend and execute and plan that will at the time it bears date, July 19th, 1889?

"*A.* No; I would not think she was."

On the cross-examination he testified that he graduated from the Detroit College of Medicine in 1887; that he had a complete set of books at his office in 1887, 1888, and 1889; that it was possible he did not see her at all until 1891. Four bills were produced given by the doctor to Mrs. More. The first one was dated December 9, 1893; it stated: "Bills rendered the first of every month. To professional services in full to date. Received payment (name here) $34.50."

"According to my best recollection, I would not like to swear that I rendered her any services prior to the services which I included in this item of $34.50, covered by Exhibit 'J.' * * *

"*Q.* There is no doubt in your mind is there, doctor, that when these four bills were paid, that Mrs. More was perfectly competent to understand the amount of these bills, what she was doing in paying it, and about the transaction of that business with you?

"*A.* Yes, I think she knew. I said yes, I think she knew that she was paying the bills. I think she knew how much she was paying and to whom the money was paid and all that."

The doctor testified that he began to practice two years before he graduated. He produced his books in court but was unable to find any visit to Mrs. More charged earlier than March, 1893.

What Justice COOLEY said in *Fraser* v. *Jennison*, 42 Mich. 206, is especially pertinent here:

"It may probably be assumed that medical men judge of mental disease by somewhat different standards from those applied by the public generally. The public judge from the conduct which they observe, and which seems to indicate either sense or insane delusions; but the medical

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expert discovers various indications of unsoundness which would escape others, and which may co-exist with careful, able and prudent management of private affairs. It is fortunate that experts have this greater ability and insight, for it enables them to prescribe for mental disease in its beginnings, and to advise the treatment of asylums before it becomes too late to arrest a growing disorder. But it would be in a high degree dangerous, as well as unjust, to deprive a man of the control of his property so soon as the indications of mental disease appear, notwithstanding he may still be managing it with propriety and judgment. For legal purposes, incapacity, either criminal or civil, must be judged of by manifestations in conduct and language. The circumstances and symptoms in which a physician alone can perceive a tendency towards mental disorder, may aid in understanding the manifestations subsequently appearing, but they can have little further value. The expert can never be put in the place of the jury, and be allowed to decide the case on his opinion of what was naturally to be looked for in the mental history of a person shown to have had peculiar surroundings and a peculiar experience. * * *

"Under the law, no doubt, whoever may make a contract may make a will; but the manner in which will cases are treated would naturally lead to a different conclusion. If, in the case of contracts alleged to be void for want of mental capacity, the same delicate tests were applied, and the same range of inquiry permitted which have become customary in testamentary cases, no one could ever know when he would be safe in dealing with his fellows; for in business one must necessarily act upon appearances, and upon the common recognition of capacity by the community; and he cannot stop to investigate whether there was insanity in the family; or eccentricity in the conduct of the person with whom he contracts or barters, or whether there is bad behavior among his children. Commerce of all descriptions must languish if contracts were subjected to the sort of inquiries which seem to be thought proper in the case of wills. Yet in law this is as admissible in the one case as in the other, and as reasonable. But nothing can be more illogical than the notion that a perceptible taint of insanity, not evidenced by any delusion or disorder which the public can detect, and not apparently affecting the ability to manage business concerns, shall vitiate all civil acts, even though it is conceded that an

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unquestionable partial insanity shall not have the like consequence, provided the delusion is upon some subject foreign to the act done. For our part we are not ready to assent to any rule that shall make a derangement of the faculties operate to incapacitate a person from making a valid will, when it is neither of a character to render the person incapable of acting rationally in the ordinary affairs of life, nor has it manifested itself in the testamentary provisions. *Meeker* v. *Meeker*, 75 Ill. 260–266. Whatever court overturns a will ought to have reasons to stand upon which are within the grasp of the common sense of mankind."

It is said Mr. Kraft, her hired man, gave testimony tending to show her incompetency. His testimony was in substance that she was sometimes forgetful. That she sometimes put money under the edge of the carpet; that she put money under the sheets in her bed and was unable to find it until she had shaken out the sheets; that he found $5 in an envelope in a little plate over the rafters in the wood shed; that when she worked in the field with him she would once in awhile, or twice a month, hoe up vegetables instead of the weeds; that she once emptied baskets that he had filled with vegetables.

"One time she had planned to make a flower bed. I started to make the bed and after I had made it she commenced to tear it to pieces for me. I asked her what she did that for, and she told me that she didn't want that bed like that. I said, 'It is just the way you wanted it,' and after talking a little while she told me to go ahead. I had started it in accordance with her plans, as I never did anything unless we consulted together and had everything as she wanted it.

"*Q.* Do you remember any occasion when she attempted to leave the house?

"*A.* Yes; she had one of those peculiar attacks. Something funny— * * *. It was when Charles More was there. She says she wasn't going to stay there tonight. It was about 4 o'clock in the afternoon. I asked her where she was going and she told me that she was going away. I told her, 'I guess not.' After a little while I talked with her and Mr. Charles More come home

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with his wagon and it kind of took her mind off and she came back to the house."

On the cross-examination the witness stated:

"When I went to market I sold the goods when I was there and if I had to go off and deliver goods, she stayed there and sold until I came back. She sold some while I was there. I continued to go to the market with her until I left there, June, 1888. When I went to work for her she fixed the wages she was to pay me. Mrs. More was my boss when I was there. Mrs. More paid me for my work at the time I left there. I used to go down to the bank for Mrs. More. I never drew money out of the bank for her. * * *

"She went to Hislop's office provided she went down to the bank. I took her with the horse and buggy. Mrs. More discussed her street opening case with me and told me she did not want the street opened. When I was with Mrs. More I used to drink quite heavily when I wanted to. I got drunk every day and worked every day, too. Generally more or less I would get drunk. I generally been full more or less every day. I think I was sober myself at all times more or less when I noticed the peculiarities I have mentioned about Mrs. Huldah More. Charles W. More was drunk a good deal when he was at his mother's and died of delirium tremens. I have been drunk when I was hoeing in the garden. Huldah More did all of the housework when Charles and I were there.

"*Q.* Then Mrs. More did not have a very pleasant life up there with you and Charles around, did she?

"*A.* Sometimes she did and sometimes she didn't. If Mrs. More owed anybody she paid it. She was a good business woman in some ways. When I left there she took a receipt from me. Mr. Clark wrote out the receipt and I signed it."

It appeared by other testimony that Mrs. More discharged the witness because of drunkenness after giving him fair warning and declined to take him back. The above is substantially all the testimony bearing upon the question of incompetency.

Other language of Justice COOLEY in *Fraser* v. *Jennison*, supra, is pertinent here:

"Now that it has become so common to assail, on alle-

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gations of mental disease, the wills of those who in life, in all their business and family relations, were treated as sane, it becomes of high importance that evidence should not be received as suggesting insanity unless it has some legitimate tendency to prove it. We are persuaded that much wrong has unwittingly been done in many cases, by allowing misfortunes, family calamities and personal peculiarities to go to the jury as having some necessary tendency to unsettle the mind, and therefore some bearing on the issue of mental soundness. As disturbing causes may be discovered in the family or personal history of almost every living person, the general result is that occasion is found for contesting the validity of almost every will, especially if the estate is sufficient to tempt the endeavor. Was the decedent afflicted with a loathsome disease? Then this presumably affected his mental health. Were his ambitious hopes disappointed? Then his reason must have given way. Did a brother have fits? Then there must have been insanity in some ancestor which has tainted the brain of all descendants. Has the only son gone to ruin? Then he must have inherited mental weakness from his father, and his bad conduct has probably reacted upon the father and disturbed his reason. Did the deceased have ways differing from most men, and rendering him eccentric? Then surely, as most men are sane, he must have been insane. Has he failed to remember some nurse or some cousin in the distribution of his bounty? Then behold, in ingratitude and want of family affection, the plain indication of mental disorder. But we need not pursue the list. Give free admission to such evidence, and no man can feel assured that the jury which examines his will in the light of his family history and personal peculiarities, will not adjudge him a madman. * * *

"It is said the provisions of the will betray ingratitude and a want of natural affection; he did not remember the nurse who cared for him with a devotion so remarkable and disinterested, and he did not distribute his estate equally among his relatives. But how do these facts prove a want of testamentary capacity? He may have justly supposed that commissioners upon his estate would award to the nurse full compensation for her labors, and nothing is more unquestionable than that, by the statute of wills, it was intended that every man should be at liberty to select the objects of his bounty among his relatives at discretion, or even to pass them all by if so dis-

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posed. When no will is made the statutes of descents and distributions regulate the division of decedent estates on the rule of equal claims, among next of kin; and if this were supposed to be the only just and proper distribution, the law would permit no other. But the right to give property by will is conferred for the very reason that the owner is supposed to be able to make, in his particular case, a better distribution of his estate than could be made by any general and unvarying rule; that he knows who by their needs, their affection, their care and solicitude for his welfare, their kind regard for himself and for those to whom he has been attached, and by the thousand other circumstances naturally operating upon the mind, should be remembered in his bounty, better than any others can possibly know, and much better than any general legislation can possibly provide. *Matter of Gleespin*, 26 N. J. Eq. 523. And even when provisions appear unnatural, it can seldom be known that there were not undisclosed reasons which would fully justify what was done if we knew them."

We now come to the other branch of the case, and that is, Should the case have been submitted to the jury upon the theory of undue influence? If any one exercised undue influence it must have been Mr. or Mrs. Clark. They lived upwards of 50 miles away from Mrs. More, and visited her once or twice a year at her home where it has already appeared she was successfully conducting her own affairs. We have already referred to the testimony that Mrs. Clark objected to Nellie Schmidt living with her grandmother, and the reasons she gave therefor, and that, notwithstanding what she said, Nellie went to live with her grandmother. Mrs. Ulrich testified that after the death of her father she went to her grandmother's with Mrs. Whittaker, when the following occurred:

"My grandmother was standing in the door. Mrs. Whittaker said, 'Mother, I brought Helen up here this morning; she said she came to attend her father's funeral.' That was the first and grandmother said, 'I don't want them here. Who sent for them?' I cannot recall what reply Mrs. Whittaker made to that, but Mr. Kraft spoke

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up and said: 'Why, Mrs. More, let her come in; she is Charles' daughter and naturally she would want to hear something about her father's death,' and then she let me in the house. When I went in I found Mr. Kraft, my grandmother and Mrs. Clark in the house and asked the question why we had not been sent for. My grandmother replied, 'I consulted with Bill and Delia about it and they said you better not come for you would only make me trouble,' and she began to cry. By Bill she meant William Clark, Adelia's husband. Then I asked her what trouble I could make, and she did not seem to be very clear upon that subject. I do not know that she made any reply to that question except that she said later in the conversation that my father had left everything he had in the world to her and if I would go back to New York and stay and not come here and make her any trouble she would do what was right by me, but if we made her any trouble I should be cut off without a cent.

"Mrs. Clark was present during the greater part of this talk. She was getting ready to return to Vernon. I cannot say she heard every particle of the conversation, but she was there in the first part of it. She was there when I went into the house. It is so long ago that I would not want to state positively that Mrs. Clark was present when my grandmother said that if I would return to New York and make her no trouble she would do what was right by me. Mrs. Clark did not say anything on that occasion and Huldah More did not say anything further that time. Nothing further was said than I have stated.

"My father died December 1st, 1887. I remained at Mrs. Whittaker's until after Christmas and then returned to New York. I cannot recall that I ever went to my grandmother's again until I returned to Detroit to live in the fall of 1888. From that time I lived constantly in Detroit until 1894. I was married in 1893. From 1894 to the 15th of November, 1901, I was away from Detroit. I have lived constantly in Detroit since 1904. My mother and sister came to Michigan in 1889 or 1890. From the time I came to Detroit in 1888 until my mother and sister came in 1889 or 1890 I was at my grandmother's once every week on an average and sometimes oftener. I never had her show me anything but the kindest spirit, except the day I came after my father was buried. I was always welcome. Sometimes, before my mother and sister came to Detroit, I would spend my Saturdays at my

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grandmother's, sometimes my Sundays. After my sister came to Detroit we used to go together and spend the day with grandmother. About a year and a half before my father died and while we were living in New York, my sister came to Detroit and visited papa for three or four weeks. During the period that I have described, Mrs. Clark visited at my grandmother's sometimes two or three times a year. Sometimes during the winter she would visit there for a couple or three or four weeks, sometimes longer, sometimes not so long, and she always made it a point until, I think, a year or two before my grandmother's death, to try to be present at her birthday, on the 23d day of March, and, of course, we were always all there, so I saw her at those times. There was a difference in my grandmother's treatment of me on these occasions when Mrs. Clark was there, and her treatment on other occasions.

"When Mrs. Clark was there grandmother did not want me to stay so long. She wanted my visits to be as short as possible. She always acted under restraint. When Mrs. Clark was there she never seemed to be able to feel free to express herself as she wanted to, or do anything about her home as she would like.

"*Q.* What do you mean when you say 'do anything about her home?'

"*The Court:* Did she talk on these occasions that way when Mrs. Clark was present?

"*A.* She talked very little.

"*The Court:* On ordinary occasions, what was the conversation?

"*A.* She would want to see me and she would tell me everything that had happened from the time I had been there before.

"*The Court:* Is that what you meant by talking under restraint?

"*A.* Yes, sir.

"*The Court:* Was there anything different in her talk, if so, point out the details, the difference in her talk?

"*A.* None, except in her reticence, her comparative reticence.

"*Q.* Was there anything else you noticed except the fact that she did not talk as much?

"*The Court:* And beyond the fact that you were not urged to remain as on other occasions?

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"*A.* No, sir. I do not think that I could say that there was."

Witness continues:

"From the fall of 1888 until almost the week that she died my gradmother and I used to talk over some of the belongings of my father and mother. Everything my mother had was in my grandmother's possession. Everything my father and mother had in their home was in my grandmother's possession. I talked with my grandmother about my obtaining some of that property in the fall of 1894, and before that time I had a general talk about this property but I did not talk with her before 1894 about my taking any of it.

"*Q.* What talk did you have in 1894 with your grandmother in regard to that? * * *

"*A.* She told me that there were certain articles in the house I might have, as long as I was going away. She said if I took them away somewhere Mrs. Clark would not know I had them. Mrs. Clark had repeatedly said she did not want us to have any of the things that belonged to my mother and father, and I took my mother's wedding presents, consisting of some silverware and two of my mother's rings and her gold bracelet, and she also gave me, and I think I took two comforters and a pair of pillows. That was before I left the city to reside, in 1894, and she knew that we were going away. She helped me to pack the box, but I could not have it until I had located in Forest, Ill., and then she sent it to me with the understanding that I was to remit her the price of the cartage and pay the freight, which I did. After I returned to Detroit I obtained some other property of father's and mother's. * * *

"We drove up there and it was pretty cold and had a light robe, and grandmother said to me 'I have a nice fur fox robe upstairs and there is a great deal of warmth in it. I would like to give it to you, but I cannot give you anything because Delia knows they are in the house and there will be trouble over it. But,' she said, 'I have a right to sell what I please. If you will give me a dollar you may have the robe, provided you can get it out of the house.' Mrs. Clark's daughter, Mrs. Payne, was in the house at that time. Grandmother did not say anything about Mrs. Payne then, she spoke about Mrs. Payne's mother. I paid the dollar and got the robe out of the back door. * * *

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"On my return from Forest I had a talk with my grandmother in regard to my having disposed of some of my things, and before that talk occurred I had a talk with her about some of my father's and mother's property that was in the house. * * * I had made a statement that I had to dispose of a number of our household goods on account of the exorbitant freight rates we had to pay, and among other things I said I had disposed of my parlor and bedroom furniture, and grandmother said, 'There is some of your father's things upstairs, Helen, including a dresser and low rocker, that belonged to your father's parlor set. I suppose you might as well have them.' So I took them. She said my aunt did not want her to give me one thing that belonged to my father.

"*Q.* At any time after you returned to Michigan from New York, did your grandmother ever say anything to you about the disposal she had made of her property or that she proposed to make of her property? * * *

"*A.* Why she said she promised my father she would do what was right by us girls and when she got through with her property she should do as she promised William, and she said he told her that when she was through with her property—to use it all if it was necessary in caring for herself, but when she was through with it—to divide it equally among the children, and she had as far as lay in her power carried out all his wishes, and she fully intended to do so. By William, she meant her husband, my grandfather.

"My grandmother made a statement to me about Mrs. Clark's interference with her business affairs. The first was in the latter part of 1888, and she made statements to me in that regard afterwards. I could not give the date. These statements were made after my return from the west, and she made statements about Mrs. Clark to me before I went west, about her interference with her business matters. Conversations on this subject occurred from the time I returned in 1888 up to the week before she died. That is all I can say.

"*Q.* What did she say in reference to Mrs. Clark during the period elapsing prior to your going away from the city during 1888 up to 1894, other than those you have specifically detailed?

"*A.* She said she never transacted any business without Mrs. Clark's advising her in regard to the matter."

On the cross-examination of this witness, it was dis-

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closed that she was given a check for $86, and signed a receipt reading as follows:

"December 9th, 1893.

"Received of Huldah More, administratrix of the estate of Charles W. More, deceased, $86.41 in full of claim due me from estate of Charles W. More, deceased, as his heir at law."

And her sister did the same thing at the same time. She also testified:

"Grandmother never told me but once that she wished I would go home when Mrs. Clark was there with her, and that was sometime about 1901. Mrs. Clark was at grandmother's at that time and had been there a week, but she was not present when grandmother told me she wished I would go home, she was not in the room. Grandmother was expecting Mr. Hislop at the time. She said she had sent for him. Mrs. Clark never indicated to me that she did not want me at my grandmother's. I had to pay Mrs. Clark's taxes as well as grandmother's."

We have quoted the testimony of this witness at great length because it is as favorable to the theory of contestants as any that was offered. It must be remembered that Huldah More is not here to give her version of what occurred, and that Mrs. Clark denies that she ever sought to influence her mother. But treating the testimony as true, what does it show? Conceding that Mr. and Mrs. Clark had advised Mrs. Huldah More against sending for the family of Charles W. More, when he died under the distressing circumstances shown by the record, it also shows that when his daughter did appear she was admitted to the house, and that her grandmother ever after that was friendly to her. It also shows that the oldest daughter, Mrs. Clark, visited her mother but one to three times each year, while the Detroit relatives visited her as often as they pleased. It also discloses that, when her oldest daughter came from 50 or 60 miles away to make her occasional visits, Huldah More desired to pay her more attention than she did the young granddaughter who lived in the same city, and whom she saw weekly.

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Is this unnatural conduct? Conceding that Mrs. Clark was opposed to her mother letting Mrs. Ulrich have the property left by the father of Mrs. Ulrich, it is evident that her desire was not controlling, for Huldah More let Mrs. Ulrich have the property which she says her grandmother told her Mrs. Clark did not want her to have. Conceding that Mrs. More told her that she never did any business without advising with Mrs. Clark, is there anything wrong about that? There is nothing to show that the advice was improper. We have already referred to the fact that before the husband of Mrs. More died, he deeded to each of the children one acre of ground; at that time Mrs. More became the owner of a little over two acres of ground. It already appears that at the time of her death she was worth in the nighborhood of $25,000. This would not indicate that she had followed poor advice, and certainly there could be no impropriety in Mrs. Clark talking with her mother about her business affairs, when her mother so desired.

When the will was made, three of the children of Mrs. More were dead. The widow of Charles W. More and his children were living at Waterloo, New York.

Mrs. Whittaker was married to a business man and was sufficiently prosperous so that when Nellie Schmidt went to live with her grandmother, Mrs. Whittaker provided her with clothing and school books. Though the Whittakers lived in Detroit, Mrs. More did not attend the wedding of Carrie Whittaker which occurred in 1879, nor the wedding of Ida Whittaker which occurred in 1882, though she was invited to both of these weddings.

A reading of the will shows that she remembered both of her living children, and all of the children of her dead children, and made such provision for each of them as she deemed wise. This will was made nearly 15 years before her death, and was at all times under her control. If, under the circumstances disclosed by this record, this will can be set aside, then no person can make a will and feel any certainty it will be given effect, if there

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are any disappointed relatives who care to contest it. The case is within *Reichert* v. *Reichert*, 144 Mich. 295; *Leffingwell* v. *Bettinghouse*, 151 Mich. 513; *In re Hoffmann's Estate*, 151 Mich. 595; *In re Dowell's Estate*, 152 Mich. 194. The court should have directed a verdict in favor of the proponents.

Error was assigned upon the opening statement of counsel, and to the running comments of another of the counsel during the taking of the testimony, of which the following is an example:

"Mrs. Charles W. More was testifying, on cross-examination, that she had presented before the commissioners on claims against the estate of Huldah More a claim for all the services she had rendered her. Mr. Van De Mark said: 'So did Mrs. Clark, and Mrs. Clark's was allowed, and Mrs. More's was not.'"

We shall content ourselves with saying that some portions of the opening statement are not to be commended, while the remarks of counsel above referred to are condemned. If counsel possesses any information in relation to the facts which he thinks should get to the jury, he should be sworn as a witness and subject himself to the rules governing the taking of testimony.

Judgment is reversed and a new trial ordered.

MONTGOMERY, OSTRANDER, HOOKER, and CARPENTER, JJ., concurred.

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ESLOW *v.* CITY OF ALBION.

1. PAYMENTS—VOLUNTARY PAYMENTS—RECOVERY—QUESTION OF LAW.

   The question as to whether payments were voluntarily made, where the facts are undisputed, is one of law.

2. INTOXICATING LIQUORS—LICENSE—PAYMENT—RECOVERY BACK—VOLUNTARY PAYMENT.

   In an action against a city to recover back monthly payments of the license fee for keeping a saloon, on the theory that the payments were made involuntarily, under threats of arrest, evidence examined, and *held*, to show that the payments were voluntarily made, and that a verdict was properly directed for defendant.

3. SAME—EVIDENCE.

   Evidence of the receipt, agreement, and protest made the year previous relative to the license fee of that year, afterwards returned, was properly excluded as immaterial on the question of whether the payments were voluntary.

Error to Calhoun; North, J. Submitted April 13, 1908. (Docket No. 46.) Decided July 13, 1908.

Assumpsit by Champion L. Eslow against the city of Albion for money had and received. There was judgment for defendant on a verdict directed by the court, and plaintiff brings error. Affirmed.

Hatch & Page, for appellant.

A. F. Cooper, for appellee.

MCALVAY, J. Plaintiff brought suit against the city of Albion to recover certain money paid for license as a saloon, authorized by a city ordinance. At the close of plaintiff's case both parties moved the court for an instructed verdict—the defendant, for the reason that plaintiff had not made a case sufficient to recover; that the

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money had been paid voluntarily, without protest, with full knowledge of all of the facts; and that the ordinance had not been shown to be invalid—the plaintiff, because from the undisputed evidence defendant has $500 of plaintiff's money received under an invalid ordinance; because the money was paid under a mistake of fact; because the payments were involuntary.

In the case of *City of Albion* v. *Boldt*, 145 Mich. 285, this court passed upon this ordinance as it then stood, holding that it was invalid because section 1 (given in that opinion) was contrary to the provisions of section 3109, 1 Comp. Laws, which provides:

"No license shall be granted for any term beyond the first Monday in June next thereafter, nor shall any license be transferable," etc.

Under that ordinance, plaintiff and others for the year 1905–1906 had paid $500 each, as a license fee, under written protest, under an arrangement claimed to have been made, that if it was declared to be invalid the money would be returned. After the decision in the *Boldt Case*, supra, the money was returned. On April 27, 1906, sections 1 and 2 of this ordinance were amended by an ordinance passed, approved, and adopted, on that date for that purpose, as follows:

"An ordinance to amend an ordinance relative to the licensing of saloons.

"The city of Albion ordains that the sections '1' and '2' of the ordinance relative to the licensing of saloons, adopted April 24th, 1905, be amended so as to read as follows:

"SECTION 1. That no person shall keep a saloon, under which designation shall be included hotels that maintain a bar, within the city limits of the city of Albion, without having first obtained a license therefor. The license fee required by this act shall be $500 per annum or $41.67 per month or any part thereof, but no license shall be granted for a less period than six months.

"SECTION 2. Drug stores selling the beverage com-

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monly sold by saloons shall be considered a saloon under this ordinance.

"This ordinance shall take effect twenty days after date of passage.

"Adopted and approved this 27th day of April, A. D. 1906.

"D. M. MCAULLIF, Mayor.
"H. E. ROBINSON, Clerk."

The monthly payments plaintiff seeks to recover in this suit were made under this ordinance.

It is claimed by the defendant that the payments made by plaintiff monthly for his licenses were voluntary payments and cannot be recovered, and that the case is controlled by the case of *Betts* v. *Village of Reading*, 93 Mich. 79. The proofs show that there was no protest. The question as to whether the payments were voluntarily made where the facts are undisputed is one of law. *Betts* v. *Village of Reading*, supra.

The material question upon the trial of the case was whether these were voluntary payments. The invalidity of the ordinance was not relied upon. There was no evidence offered by defendant. The record shows that plaintiff was acquainted with the situation. He knew that the question as to the validity of the ordinance was before this court. He knew of the amendment allowing monthly licenses. His first payments were made by him to the city treasurer without any urging on the part of the city officials. The first said to him was at the time of his third payment, when the treasurer said:

"You will have to get here more promptly, for you are liable to be arrested."

He knew when the *Boldt Case* was decided in July, 1906, and he received his $500 back from the city. He continued his payments from month to month during the balance of the year and at no time made any protest or objection. In December the treasurer came to the hotel and told him he was liable to be arrested as he was not prompt in paying. In April, 1907, after he had paid part

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of the license for that month, the mayor came to him about the 10th of the month and said the balance must be paid next morning by nine o'clock or he would be arrested. A fair inference from his testimony is that he did not have the money, and next morning he asked for time, saying that he could pay it then. The foregoing is the substance of all his testimony upon any duress or threats. Nothing could be possibly claimed from any of this except the last, and that was not sufficient to make the payment then made involuntary. It certainly could have no bearing upon the earlier payments. This disposes of his claimed threats by the city treasurer and the mayor. There is the further claim that he was also put in fear of arrest by his knowledge of the arrest of Boldt Brothers. His testimony does not warrant such claim.

We find that as a matter of law the payments were voluntary. The case cannot be distinguished from *Betts* v. *Village of Reading*, supra.

Error is assigned because the court refused to admit in evidence the receipt, agreement, and protest made the year previous relative to the license fee afterwards returned. The evidence offered was immaterial and could have no bearing upon the question as to whether or not the payments sued for were voluntary.

The judgment is affirmed.

GRANT, C. J., and BLAIR, MONTGOMERY, and CARPENTER, JJ., concurred.

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PEOPLE, *ex rel.* ELLIS, *v.* CALDER.[1]

1. CONSTITUTIONAL LAW — VALIDITY OF STATUTES — MOTIVES OF LEGISLATURE—JUDICIAL INQUIRY.

   That the members of the legislature voted for a bill repealing a special charter, previously granted to a private corporation, without investigating the merits, and in compliance with a custom relating to local measures, and in reliance upon the representations of the members from the locality affected to the effect that the delegation from that county were a unit in favor of the bill, and that it did not involve a subject upon which the people of the State were interested, is not admissible to impugn the constitutionality of the repealing act, the motives of the legislature in passing a law not being open to inquiry.

2. SAME—GOOD FAITH OF LEGISLATURE—PRESUMPTION.

   The courts conclusively presume that the legislature acts in good faith.

3. CORPORATIONS — SPECIAL CHARTERS — REPEAL — NOTICE AND HEARING—SUFFICIENCY—CONSTITUTIONAL LAW.

   An objection to a law repealing the charter of a corporation that notice was not given as required by section 16, article 15, of the Constitution, is untenable, where it appears that notice was given to the legislature of the member's intention to introduce the bill, as required by sections 8569–8571, 3 Comp. Laws, and that, though the officers of the corporation were not formally notified, they had knowledge of the pending bill and were given a hearing by the governor and denied a hearing by each house of the legislature.

4. SAME—REPEAL OF CHARTER—CONSTITUTIONAL LAW.

   Section 16, article 15, of the Constitution, providing for notice of an application for an alteration of the charter of any corporation, has no application to the repeal of a charter.

5. CONSTITUTIONAL LAW—SPECIAL CHARTER — REPEAL — VALIDITY —OBLIGATION OF CONTRACTS — DUE PROCESS OF LAW — TAKING PRIVATE PROPERTY.

   The repeal, by the legislature, of the special charter of a water

[1] Returned to Supreme Court of the United States on writ of error August 18, 1908.

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company, acting under a reserved power in the charter, cannot be said to violate the obligation of any contract between the water company and the State, nor to deprive it of its property without due process of law, nor to take its property for public use contrary to section 2, article 18, of the Constitution.

6. SAME—RIGHTS OF BONDHOLDERS.

The constitutional rights of the holders of the bonds of a private corporation are not impaired by the repeal of the corporation's charter, in accordance with a reserved power in the charter, since the franchises mortgaged to secure the bondholders are no other or different than those granted to the corporation.

7. ESTOPPEL—MUNICIPAL OFFICERS—ENFORCEMENT OF STATUTE.

An objection to the enforcement of a statute repealing the charter of a water company, on the ground that it was passed in consequence of the wrongful conduct of certain officers of the city affected, is untenable in a case in which the repealing act is sought to be enforced, not for the benefit of the officers whose conduct was wrongful, but for the benefit of the entire inhabitants of a city who were guilty of no wrong.

8. EMINENT DOMAIN — NECESSITY OF TAKING — DETERMINATION — COMPENSATION—SUFFICIENCY.

Where a statute repealing the charter of a water company gave the company the right to present a claim for the value of its tangible property to the common council of the city wherein it was situated, an objection that the provision is unconstitutional because (*a*) it permits property to be taken for the public without the determination of necessity as provided in the Constitution; and (*b*) that the compensation provided is unlawful and inadequate; is untenable, where the provision is merely permissive, and if the corporation accepts, it voluntarily sells its property on the terms stated in the provision.

Error to Kent; Perkins, J. Submitted January 13, 1908. (Docket No. 46.) Decided July 13, 1908.

Quo warranto proceedings by the people of the State of Michigan, on the relation of George E. Ellis and others, against John F. Calder and others to test the right of re-

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spondents to act as a corporation. There was judgment of ouster, and respondents bring error. Affirmed.

Kingsley & Wicks (*John E. More*, of counsel), for appellants.

John E. Bird, Attorney General (*Moses Taggart* and *Ganson Taggart*, of counsel), for appellee.

This is a quo warranto proceeding instituted in the Kent circuit court to test the right of respondents to act as a corporation under the name and style of the Grand Rapids Hydraulic Company. The Grand Rapids Hydraulic Company was incorporated under Act No. 223 of the Laws of 1849, for the purpose of supplying water for the use of the inhabitants of Grand Rapids. The act contained no limitation upon the life of the corporation save this: It was provided that "the legislature may at any time hereafter amend or repeal this act." In 1905 the legislature exercised this authority, and by Acts No. 455 and No. 492 of the Local Acts of that year repealed said Act No. 223 of the Laws of 1849. At the same time it gave to said company the right to present a claim for the value of its tangible property to the common council of the city of Grand Rapids.

The question in this case is whether said repealing acts are constitutional. Relators contend that they are. Respondents deny this. The circuit court held that they were constitutional and entered a judgment of ouster against respondents. Respondents bring the case to this court for review. They contend that the repealing acts are unconstitutional for various reason, which will be considered under the following heads:

(1) Motives of the legislators.
(2) Notice and hearing.
(3) General constitutional objections.
(4) Estoppel.
(5) Provision for presentation of claim.

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CARPENTER, J. (*after stating the facts*). 1. Motives of the legislators. The respondents admit that more than two-thirds of the members-elect to each house voted for the repealing laws in question. They complain because they were denied the right to prove that they so voted without investigating the merits, and "without in fact exercising their judgment and discretion on the merits," in compliance with a custom relating to local measures and in reliance upon the representations of the members of Kent county to the effect "that the delegation from Kent county was a unit in favor of said bill and that it did not involve a subject in which the people of the State of Michigan were interested." We think the ruling complained of was correct. In *People* v. *Gardner*, 143 Mich., at page 109, we quoted with approbation from Cooley's Constitutional Limitations (7th Ed.), p. 257, as follows:

"And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. The reasons are the same here as those which preclude an inquiry into the motives of the governor in the exercise of a discretion vested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people."

In this connection we notice the contention of respondents that in repealing that law the legislature must act in good faith. It is sufficient to say that the courts must conclusively presume that the legislature did act in good faith. Under the rule above stated the courts have no authority to investigate that question. The only cases to which our attention is called, which oppose this principle, relate to certain proceedings of municipal bodies. The principle of those cases is limited. It does not extend even to legislative action of municipal bodies. It certainly does not apply to this case. This was decided in *People* v. *Gardner*, supra.

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2. Notice and hearing. Respondents contend that they were not given the notice and hearing to which they were entitled by section 16, art. 15, of our Constitution. That section reads:

"Previous notice of any application for an alteration of the charter of any corporation shall be given in such manner as may be prescribed by law."

The repealing law was enacted twice by the legislature in 1905. One of these laws is Act No. 455, Local Acts 1905; the other is Act No. 492, Local Acts 1905. Act No. 455 received the approval of the governor April 5, 1905. Act No. 492 received the approval of the governor April 25, 1905. It appears from respondents' plea that they had no formal notice of this pending legislation. They did, however, learn of it, and were afforded a hearing by the governor, but were denied a hearing by each house of the legislature. It also appears by their plea that the bills were introduced by legislators from Kent county, who had been requested to take this action by the municipal authorities of the city of Grand Rapids. It also appears that the legislator who introduced the bill had given more than one day's notice of his intention so to do. Each of the acts was passed in due form. Act No. 492 received a vote of more than two-thirds of the members-elect to each house. Under these circumstances were respondents denied any rights given them by section 16 of article 15? At the first session of the legislature, after the Constitution of 1850 took effect, it passed a law providing for the giving of notice in cases coming under said section 16. That law is found in sections 8569, 8570, and 8571, 3 Comp. Laws. Of this law it was said by Justice CHRISTIANCY, in *People* v. *Hurlbut*, 24 Mich., at page 54:

"The effect of this act, and of the constitutional provision under which it was framed, would be to justify the legislature in disregarding, and probably—while the act remains in force—to impose upon them the duty to dis-

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regard the *application* as such, until the proper notice should have been given as provided by the act. It does not, however, operate to restrict the right of the legislature itself to make such amendment as they may think the public interest may require; nor does it restrict the right of any member of either house of introducing a bill for that purpose on giving one day's previous notice of his intention so to do. Nor do we think, as insisted by the counsel for the respondents, that the notice, when given in either house by a member, is by this act required as in case of an '*application*' in behalf of the corporation or individuals, 'to set forth briefly the nature of the alteration *applied* for.' This provision applies only to cases where alterations are '*applied for*' from *without* the legislature itself, and is coextensive *only* with the provision requiring the publication of the notice of such application. The provision allowing a member of either house to give one day's notice of the intention to introduce a bill for such purpose was, we think, intended to recognize the almost universal custom or practice in legislative bodies in this country to require one or more days' notice from a member of his intention to introduce, or ask leave to introduce, a bill; in which case nothing more than the title or general object of the bill is usually required.

"It is urged that if this be the true construction of the Constitution and the act, both may be readily evaded; as it would always be practicable for the corporation to procure some member of the house or senate to give the one day's notice, and to introduce the bill on his own responsibility as a member. This may or may not be true; but if true, it is a difficulty inherent in the nature of the subject itself, and for which the courts cannot provide a remedy. A proper respect for a co-ordinate branch of the government requires us to presume that each member of the legislature acts upon his individual conviction of public duty, and that he will not become the willing instrument of designing parties, to enable them to evade the statute or the Constitution."

This reasoning, which we thoroughly approve, answers every argument advanced by respondents in support of their claim that they were entitled to notice under section 16 of article 15 above quoted. Perhaps it might also be stated that section 16 of article 15 has no application to a repeal of a charter. There is a distinction between an

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alteration and a repeal. See *Yeaton* v. *Bank of the Old Dominion*, 21 Grat. (Va.) 593.

3. General constitutional objections. In the circuit court respondents urged that the repealing act impaired the obligations of the contract between the hydraulic company and the State, contrary to the provisions of the Constitution of the United States; that it deprived the company of its property without due process of law, contrary to the provisions of the Constitution of the State of Michigan and of the 14th Amendment of the Constitution of the United States; that it took its private property for public use in contravention of section 2 of article 18 of the Constitution of Michigan. In our judgment none of these objections are tenable. The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take from it this, and only this: Its right to continue to be a corporation. It takes from it no right, franchise, or power which does not depend for its existence upon the granting clause of the charter, and these it had a legal right to take. *Greenwood* v. *Freight Co.*, 105 U. S. 21. These rights it obtained from the legislature of the State of Michigan. By its terms the law granting these rights might at any time be repealed by the legislature. The corporation would exist until, and only until, the legislature repealed the law creating it. The life of the corporation expired, according to the terms of its charter, with the repeal of the law. Any argument that the repeal destroyed any constitutional right must rest upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such right. If authority in support of this reasoning be needed, we think it is found in *Greenwood* v. *Freight Co.*, supra.

In this connection, we consider the claim of respondents that the constitutional rights of certain holders of bonds of the corporation are impaired by the repealing acts.

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These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property and franchises. We deem it sufficient to say that the franchise mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage in any way change its effect or lessen the right of the legislature to repeal it at any time. The bondholders acquired no greater rights than the corporation had. The existence of the bonds secured by the mortgage is therefore an entirely immaterial circumstance and in no way affects the correctness of the foregoing reasoning.

4. Estoppel. Respondents contend that the repealing acts cannot be enforced because they were passed in consequence of the wrongful conduct of certain officials of the city of Grand Rapids. Whether the principle of estoppel can ever be invoked to prevent the enforcement of a valid legislative enactment, we do not decide. We do decide that it cannot be invoked in this case. Here the repealing acts are sought to be enforced, not for the benefit of those whose conduct was wrongful, but for the benefit of the entire inhabitants of a great city who were guilty of no wrong. Their right to have the law enforced cannot be affected by the circumstance that some agent of the municipality acted improperly in procuring its enactment.

5. Provision for presentation of claim. The repealing acts give the corporation the right to present a claim for its tangible property to the common council of the city of Grand Rapids. It is contended that this provision is unconstitutional because (*a*) it permits property to be taken for the public without the determination of necessity as provided in the Constitution; and (*b*) that the compensation provided therein is unlawful and inadequate. It is a sufficient answer to each of these claims to say that this provision is not compulsory. It has no force unless the corporation chooses to accept it. If the corporation does accept, it voluntarily sells its property on the terms stated

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in said provision. To this there is no constitutional objection.

It results from this reasoning that the judgment of the circuit court must be affirmed.

GRANT, C. J., and BLAIR, MOORE, and MCALVAY, JJ., concurred.

TOWNSHIP OF ALPENA *v.* MAINVILLE.

1. EVIDENCE — HEARSAY — STATEMENTS IN PARTY'S ABSENCE—ADMISSIBILITY—EFFECT OF CROSS-EXAMINATION.

   Where, in an action against the principal and sureties on a township treasurer's bond, defendant treasurer claimed credit for moneys paid on account of school taxes, which the school district treasurer claimed he had already had credit for, defendants cross-examined at length a witness as to what the school treasurer claimed with respect to the matter at a meeting of the township officers, the school treasurer was properly permitted to state the conversation, over the objection that defendants were not present.

2. WITNESSES—CREDIBILITY—CROSS-EXAMINATION.

   Defendant treasurer being sworn as a witness, it was proper, on cross-examination, as affecting his credibility, to show that in many instances, while he was treasurer, he had collected taxes and given receipts therefor, but had not marked such taxes as paid on the tax-roll, and they were returned as delinquent.

3. TRIAL—RECEPTION OF EVIDENCE—REBUTTAL—PROPRIETY.

   Defendant treasurer, having testified that he thought he had paid a certain order through the bank, the cashier of the bank was properly called on rebuttal to show what arrangement had been made whereby money was placed by the treasurer in the bank, and orders drawn on account, and whether the order in question had been so paid.

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4. EVIDENCE—MATERIALITY—EVIDENCE TENDING TO AUTHENTICATE EXHIBITS.

Where a paper claimed to be that upon which the school and township treasurers cast up their account at the time of coming to a settlement at a bank had been introduced in evidence as an exhibit, the cashier of the bank was properly permitted to testify that at the time in question scratch pads containing leaves of similar color and size were in use at the bank.

5. NEW TRIAL—GROUNDS—REFUSAL—PROPRIETY.

It was not error to deny a new trial urged upon the grounds (*a*) that plaintiff's counsel, without objection at the time, illustrated his argument with a child's shoe of the size of one in which defendant claimed an important paper had fallen from a shelf and for a time become lost; (*b*) that a juror walked on the way to court with said counsel; (*c*) that counsel was intemperate in argument, the impropriety amounting only to a breach of good taste, and not of law.

Error to Alpena; Emerick, J. Submitted April 16, 1908. (Docket No. 82.) Decided July 13, 1908.

Debt by the township of Alpena against William H. Mainville, principal, and John Beck and Andrew W. Comstock, sureties, upon an official bond. There was judgment for plaintiff, and defendants bring error. Affirmed.

Joseph H. Cobb, for appellants.

Charles R. Henry (*Lemuel G. Defoe*, of counsel), for appellee.

MCALVAY, J. Defendant Mainville was township treasurer of plaintiff township for the years 1902 and 1903. His codefendants were sureties upon his official bonds for both years. Claiming that there was a balance due from Mr. Mainville of moneys which had come into his hands as such treasurer, and which he refused on demand to pay over, this suit was brought to recover the same.

This township under a special act of the legislature is included in one school district. During the term of defendant's office as town treasurer, Paul Weine was treas-

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urer of the union school district. As such treasurer, on January 17, 1903, he drew an order upon defendant, on account of school taxes collected for 1902, in the sum of $900, which was paid by defendant January 22, 1903.

On March 16, 1903, school treasurer Weine drew an order on defendant for $4,341.74 for school taxes collected for the year 1902. It is admitted that this last order was for the entire amount of school taxes for that year, and that defendant would be entitled to credit on it for the $900 already paid on account of these taxes. The two treasurers had a meeting at the Alpena County Savings Bank on March 18, 1903, and settled their account. Mr. Weine claims that in the settlement this $900 was allowed treasurer Mainville. Mr. Mainville claims that it was not taken into account or allowed. The court in his charge to the jury stated the claims of both sides upon this, the only dispute in the case between them, as follows:

"Now, each of the parties—each of the gentlemen, make up their figures of the transaction on that day, and I will give them to you.

"Mr. Weine says that on that day Mr. Mainville was to pay him two sums. *First*, this order of $4,341.74; and, *secondly*, another order which he held in his hands, which had been drawn the year before, upon November 7th, 1902, for the sum of $181.96, delinquent taxes and delinquent library money which Mr. Mainville had received from the county treasurer. He says he had those two demands, those two demands in his hands against Mr. Mainville. Those two demands would amount to $4,523.70. And he says that Mr. Mainville was then entitled to two items of credit against that demand. Two items of credit. What are they? *First*, this $900. He says he was entitled to that. *Second*, the amount of certain school orders, which Mr. Mainville had paid and redeemed and had in his hands, and which were a charge against the district and a credit to Mr. Mainville, amounting to $287.95. Now, the amount of the demands which he held against Mr. Mainville, he says, was $4,523.70, and these two credits $900 and $287.95, being added together, makes $1,187.95. Subtracting those two credits of Mr. Mainville's from the demands which were there presented against him, leaves

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$3,335.75, and he says that for that sum Mr. Mainville gave him his check, which he did.

"Now, that is Mr. Weine's account. That is Mr. Weine's claim. There is no question, gentlemen, in this case, but what upon that occasion, and as the settlement between them, that Mr. Mainville gave Mr. Weine his check for $3,335.75, and Mr. Weine says that that is the amount —Mr. Weine says that that was the manner in which that amount was arrived at.

"Now, what does Mr. Mainville say? Mr. Mainville says, first, that he did not know, at that time, that this sum of $4,341.74 included all the taxes which he had collected in this township for the school district. That he supposed he was bound to pay that, in addition to this $900, which he had already paid. So he has said here in this case as a witness; and that he did pay that amount, $4,341.74, supposing that it was an existing demand against him for that amount of money; and that, really, the school taxes which he had collected, would not amount to that sum, but would be $900 more or $5,241.74. That acting upon such belief, that he treated that as what he should settle for. That he had in his hands at that time, in school orders which he had redeemed, the sum of $1,005.99.

"You understand me. He says that he had it in his hands at that time, in school orders which he had already paid and redeemed for the district, and, of course, for which he was entitled to credit, if he had paid them, the sum of $1,005.99; and that subtracting that sum from the amount of this order of $4,341.74, left $3,335.75, which was the amount which he should account for to the district, and that he gave his check therefor.

"Now, gentlemen, there are the two opposing positions of these men. That is the manner in which they array themselves, one against the other in battle upon this subject. And it is for you to say, from the evidence in this case, which of them is correct.

"Mr. Weine claims that this subject of the payment of the $900 was discussed between them, and was given to this man as a credit. Mr. Mainville says it was not mentioned. Mr. Weine says that he made there at that time, these figures upon this little slip of yellow paper and that Mr. Mainville must have seen him writing them down. These figures, which represent in substance Mr. Weine's claim, as he figures, and as I have given them to you—I

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say, in substance. These figures, however you arrange them, will show the same thing. Mr. Mainville denies that. He says he neither saw Mr. Weine writing upon that paper, nor did he see such a paper there, and the subject of the $900 was not mentioned between them.

"Now, gentlemen, you have got to decide that between these men. There is no use in mincing matters. It is a flat contradiction."

The question in the case was one of fact, and was fairly submitted by the court in his charge to the jury, to which no exception was taken. The plaintiff recovered a judgment for the amount claimed, with interest.

The errors assigned by defendants upon which we are asked to reverse the judgment relate:

(1) To the admission of evidence.
(2) To the refusal of the court to grant a new trial.
(3) To improper argument by plaintiff's counsel.

1. It is claimed that the court erred in allowing witness Paul Weine to testify to a conversation he had with the members of the town board at a certain meeting, under objection that none of defendants were present. Defendants had cross-examined the town clerk at length as to what witness Weine had claimed at this meeting. When the objection was made the court said:

"I permit this in view of the cross-examination of the witness DeLaval yesterday. If I recall it correctly, he was interrogated exactly upon this point as to what claim Mr. Weine made at that time."

It was not error to allow the question to be answered. The fact that defendants were not present was immaterial.

Error is assigned upon evidence admitted to show the conduct of defendant Mainville relative to the collection of taxes. Upon his cross-examination it was shown that in many instances while he was treasurer he had collected taxes and given receipts therefor, but had not marked such taxes as paid on the tax-roll, and they were returned delinquent. This evidence was offered

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as bearing upon the credibility of defendant, and was properly admitted. The court in allowing this specifically limited it to cross-examination. *Pratt* v. *Wickham*, 133 Mich. 356, and cases cited.

Defendant Mainville had testified relative to a certain order, material to the issue, that he thought he had paid it through the bank. Mr. Prince, the cashier, on rebuttal, was produced to show what arrangement had been made whereby money was placed by the treasurer in the bank, and school orders drawn on the account, and also to show whether the order in question was so paid. It was not error to permit such proof to be introduced and it was proper rebuttal.

Exception was taken, and error is assigned, upon the admission of some testimony of the cashier of the bank relative to two exhibits. The first of these exhibits was claimed to be the original memorandum of the figures Mr. Weine made at the time he settled with Mr. Mainville at the bank. The cashier was allowed to testify that at this time paper similar in color (yellow) and size was in the directors' room where the settlement was made. As to the other exhibit, which was a blank leaf from a scratch pad similar to the exhibit first referred to, witness testified that such pads were in use at the bank. This was allowed upon the offer made by plaintiff that it was to show that there was paper used in the bank similar to that on which the other exhibit was written. This evidence was material and properly admitted.

2, 3. Error is assigned because the court denied a motion for a new trial, based upon the claim that plaintiff's attorney used an improper illustration in his argument; because of claimed improper conduct of such attorney towards a juror, and because of intemperate argument.

The following reasons were filed by the court for denying this motion:

"The charge of the court in this case contains a full

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statement of its facts, which I shall not repeat at length here, but only refer to the same for the purposes of the present motion.

"On March 31st, 1903, the defendant Mainville, as township treasurer, made his settlement with the township board and was found to owe the township $822.93. He did not present to the board at this time Exhibit A, being the order for $900 drawn by Union School District No. 1 of the township of Alpena upon the township treasurer on January 17, 1903, and which sum Mainville claims he paid the second time on March 18, 1903, to the treasurer of such school district on his final settlement for the year with that officer. On the trial he accounted for his failure to make such claim before the board for this item of double payment of school money by saying that the order itself was temporarily lost at the time of his settlement with the board and he himself had forgotten the facts. His wife testified the paper (Exhibit A) was kept with others upon a shelf in a cupboard, and, sometime after the settlement, was found in a child's shoe in the bottom of the cupboard. Being asked the age of the child, she said five years.

"In the opening argument to the jury Mr. Henry produced a child's shoe, which he asserted would be about the size of a shoe ordinarily worn by a child of that age, and argued to the jury the improbability of such a paper as Exhibit A having been lost in such a place. No objection whatever was made to this proceeding by defendants' counsel until after the jury had been charged by the court and had retired to deliberate upon their verdict, when counsel objected to the use of the shoe because the same had not been offered and put in evidence, and asked to have the jury recalled and discharged. I do not think the point well taken. The comparative size of such a child's shoe is a matter of such common knowledge the jury could not have been misled. It seems this shoe was procured by Mr. Henry from the store of George Masters & Sons, and Mr. George Masters, Jr., a member of the firm, was also a member of the jury. When Mr. Henry went to the store Mr. Masters was not in, and it is not claimed the shoe was procured from him, but he afterwards came in and walked to the court-house with Mr. Henry. It is claimed this should invalidate the verdict.

"I am aware that in Wayne county, and perhaps in other circuits, the standing rules of court forbid a lawyer

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to converse with any juror while a case is on trial. No such rule exists in this circuit and I doubt its necessity in this community.

"It cannot be because a lawyer's neighbor is sitting as a juror on a trial in which he is engaged, and they walk together to the court-house conversing upon indifferent matters, that of itself will avoid a verdict. But that is the claim made here. I do not agree with such a rule and decline to set aside the verdict for that reason.

"It is only just to Mr. Masters to say that no one for a moment contends that it would be possible to speak to him.

"Some of the language of Mr. Dafoe in his closing argument to the jury in reference to Mr. Mainville is made a ground for asking a new trial. The point raises a question of good taste and not of law. *People* v. *Tubbs*, 147 Mich. 8, 9; *Driscoll* v. *People*, 47 Mich. 413.

"Defendant's motion for a new trial is therefore denied, but without costs.

"Dated February 9th, 1906.

"FRANK EMERICK, Circuit Judge."

It was not error to deny this motion for the reasons given by the court. We find no error in this record.

The judgment is affirmed.

GRANT, C. J., and BLAIR, MONTGOMERY, and CARPENTER, JJ., concurred.

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ACTION.

1. Where, in an action for the price of sawing certain lumber, plaintiff's testimony is open to the construction that the contract obligated defendant to pay the agreed price per thousand as fast as the lumber was sawed, the court cannot say, as a matter of law, that the action was prematurely brought, on the ground that, under the contract, plaintiff was obliged to wait for his pay until the lumber was inspected. *Westcott* v. *Wade*, 340.

2. A court has general power to postpone the hearing of an action at law until after the hearing of a suit in chancery involving the same matters when both causes are before it, and the determination of the chancery suit will conclude all of the parties to the action at law, while the determination of the law case would not bind all of the parties in the chancery case. *Vaughan* v. *Wayne Circuit Judge*, 478.

ACTION ON THE CASE—See SALES (4, 5).

ADVERSE POSSESSION.

1. In ejectment to recover a strip of land along a boundary, a finding that plaintiff had occupied the land for a sufficient period to acquire title by adverse possession was sufficient to support a judgment in his favor. *Cudney* v. *Sherrard*, 239.

2. Whether repeated trespasses accompanied by violence and by destruction of property will ever grow into a right as by adverse possession, they cannot do so in less time than is required to gain a right by open, notorious, hostile, and peaceable possession, or use. *Moore* v. *Bulgreen*, 261.

See EASEMENTS (5); EJECTMENT (1).

ALIBI—See TRIAL (1).

ALIMONY—See EXECUTORS AND ADMINISTRATORS (9).

AMENDMENTS—See EJECTMENT (2); INSURANCE (5); PLEADING (2, 4–6); PROCESS; SALES (5); STATUTES (4).

ANIMALS.

1. Act No. 221, Pub. Acts 1899, making it the duty of ice cutters to barricade openings in the ice, was not intended to protect or prevent injury to unattended animals, and does not create a liability in favor of the owner of a cow allowed to go un-

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ANIMALS—Continued.

attended to a lake to drink and drowned in an unprotected hole in the ice made by defendant. *Richards* v. *Waltz*, 416.

2. Where plaintiff knew that ice was being cut in a lake near his home, and presumably knew the character of the barricade required by the statute to be erected about the cutting, he was not free from negligence in allowing his cattle to go to the lake unattended to drink. *Id.*

APPEAL AND ERROR.

1. The court will not enter into a doubtful legal question involved in a case where the plaintiff in error requests that, unless the case can be reversed and no new trial granted, it be affirmed, and the case is not one in which the court would deny a new trial. *Daniels* v. *Bay City Traction & Electric Co.*, 96.

2. On error to review a judgment against a street-railroad company for injuries to the driver of a vehicle, the court will not deny a new trial on reversing the judgment, where it is inferable from the record that on retrial plaintiff might establish a custom on the part of the defendant to stop its cars and permit drivers, situated as was plaintiff, to cross its tracks in safety, and that he relied upon such custom, thereby relieving himself from contributory negligence. *Id.*

3. Where the appellee points out no errors in appellant's statement of facts, but makes an entirely distinct statement, raising questions not involved in appellant's statement, in disregard of Supreme Court Rule 40, the court will adopt the statement made by appellant, and consider only the question raised thereby. *Haden* v. *Closser*, 182.

4. Where, in a case tried to the court, no amendments to the findings appear to have been proposed, the court will presume the findings were warranted by the evidence. *Cudney* v. *Sherrard*, 289.

5. The court does not consider questions not raised by the record. *Id.*

6. A judgment for defendant will not be reversed where plaintiff could recover only nominal damages in any event. *Laetz* v. *Tierney*, 279.

7. Where a judgment for plaintiff is reversed because of a variance between the declaration and proofs that cannot be avoided by amendment without introducing a new cause of action, and limitations have run against the action, no new trial will be ordered. *Fisher* v. *Radford*, 385.

8. On error to review the judgment of the circuit court on certiorari to review the judgment of a justice of the peace, the court will not consider a question not made in the circuit court nor presented by the affidavit for the writ of certiorari. *Foster* v. *Watson*, 400.

9. An assignment that the court erred in directing a verdict for defendant implies that upon the pleadings and evidence a

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APPEAL AND ERROR—Continued.

prima facie case was made, and is sufficiently specific. *Wolfe* v. *Stack*, 445.

10. The opinion of the case on a previous appeal is the law of the case, no difference in the records being pointed out. *Schneider* v. *Township of Brown*, 454.

11. A determination on a former appeal that plaintiff made a case for the jury, approved upon a second appeal, will be followed upon a third appeal, the record being in legal effect the same. *Anderson Carriage Co.* v. *Pungs*, 580.

12. Where it is contended that a ruling of this court on a former appeal as to the admissibility of certain evidence was used upon the retrial as an opportunity to introduce immaterial and damaging evidence, but an examination of the record satisfies the court that the trial court kept within the ruling, no error appears. *Id.*

13. An appeal from a final order confirming a commissioner's corrected report of sale in chancery foreclosure proceedings, and ordering the execution of a new deed for the purpose of correcting a clerical error in the previous one, brings up the order vacating the order nisi confirming the original report, and all intermediate proceedings. *Walsh* v. *Colby*, 602.

14. A determination on a former review that the testimony warranted the submission of certain questions to the jury will be followed on a subsequent review on a record not materially different from the former one. *O'Dell* v. *Goff*, 643.

15. Rulings admitting testimony to which no exceptions were taken cannot be reviewed. *Id.* 644.

16. A point made upon the oral argument as to the competency of nonexpert witnesses to express an opinion, not made in the brief nor in the trial court, will not be considered. *Id.*

17. Whether the testimony of an agent of a party since deceased was incompetent under section 10212, 3 Comp. Laws, as amended by Act No. 80, Pub. Acts 1903, will not be decided, where the objection was not made in the trial court. *Lewis* v. *Jacobs*, 664.

18. Objections made in appellant's supplemental brief, not made in the original brief, will not be considered. *Id.*

See HARMLESS ERROR; SAVING QUESTIONS FOR REVIEW; TRIAL (2).

ARGUMENT OF COUNSEL—See CRIMINAL LAW (7); TRIAL (3, 10).

ASSUMPSIT.

1. Recovery may be had by a servant, under the common counts in assumpsit, for the value of services performed, subject to a deduction for failure of plaintiff to perform his contract, where he left the service before completion of the contract period. *Williams* v. *Crane*, 89.

2. Where, in an action on the common counts in assumpsit, to

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ASSUMPSIT—Continued.

which the general issue is pleaded, plaintiff claims the right to recover on the count for money had and received on the theory that he paid $10 to defendant for $10 worth of steel, which defendant refuses to deliver or repay the money, and defendant denies his right to recover on the ground that plaintiff bought a larger quantity of steel, paying $10 on the purchase price, and that he is ready to deliver the steel on receipt of the balance due, the pleadings and evidence raise a question of fact for the jury. *Morse* v. *Ressler*, 512.

See PLEADING (1, 5); SALES (4, 5).

ATTORNEY AND CLIENT—See WITNESSES (4).

BANKS AND BANKING.

1. Where, in an action by the receiver of a railroad company against a bank to recover money paid by defendant out of the funds of the company on a forged warrant, plaintiff showed that a trusted employé of the company erased or caused to be erased, with the aid of others, the name of the real payee and substituted the name of another, who was either a fictitious person or a real one unknown to the drawer, a prima facie case of a fictitious payee was made out. *Harmon* v. *Old Detroit Nat. Bank*, 73.

2. As between a depositor and a bank, the burden of proving payment by a valid check or other voucher is upon the bank. *Id.*

3. Where a bank pays a forged check, or one upon which the name of a fictitious payee has been fraudulently substituted, the fact that the check came to the paying bank through other banks does not relieve it of the duty of investigation to determine the identity of the original presenter with the payee named in the check, and if the paying bank chooses to rely upon the identification accepted by the bank which cashed the check, it does so at its own risk. *Id.*

4. Section 4870, 2 Comp. Laws, making checks drawn in favor of fictitious payees payable to bearer, has application only to cases in which the drawer knowingly draws the check to the order of a fictitious payee, and hence does not apply to a case where a trusted employé of a railroad company fraudulently erased the name of the proper payee in a valid warrant and substituted the name of a fictitious person. *Id.*

5. Where, after a proper voucher and warrant issued at Detroit by a railroad company had been approved by the necessary officers, a trusted employé fraudulently caused the name of the proper payee to be erased and one unknown to the maker substituted, and the warrant in due course of business was mailed to the address of the substituted payee in Chicago, and by someone cashed in Denver, the drawee was not relieved of the duty of using due diligence in identifying the payee, since such duty is not changed by the time or place of the forgery, unless the forgery was committed under such circumstances as to show negligence on the part of the drawer. *Id.*

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BANKS AND BANKING—Continued.

6. Where a warrant issued by a railroad company, payable at a bank in Detroit, was fraudulently altered, after approval, by the substitution, by a trusted employé of the railroad company, of the name of another person, or a fictitious person, as payee, and the warrant was, in the due course of business, mailed to the address given of the fraudulent payee in Chicago, and cashed by a bank in Denver, and subsequently received through several banks and paid by the drawee, the burden was upon the drawee, as between it and the drawer, to show the existence or non-existence of the substituted payee, and that the Denver bank took the proper means to identify him. *Id.* 74.

BENEFICIAL ASSOCIATIONS—See INSURANCE (2–4, 6–8).

BILLS AND NOTES.

1. In an action on a promissory note, the defendant having denied the execution of the note, testimony tending to show that plaintiff left for collection another note purporting to be signed by another party, and on being confronted with the supposed maker, made contradictory statements, from which the jury might infer that the note was a forgery, is admissible on the question of intent. *Hyman* v. *Kirt*, 113.

2. Where the defendant has denied the execution of the note sued upon, inquiry into the result of an action by the same plaintiff upon another note, in which the defense was that the note had been paid, raises a collateral issue which plaintiff cannot be expected to be prepared to meet, and is incompetent. *Id.*

BREACH OF MARRIAGE PROMISE—See TRIAL (10).

BURDEN OF PROOF—See BANKS AND BANKING (2, 6); MASTER AND SERVANT (18).

BURGLARY.

1. If any force at all is necessary to effect an entrance into a building, through any place of ingress, usual or unusual, whether open, partly open, or closed, such entrance is a breaking sufficient in law to constitute burglary if the other elements of the offense are present. *People* v. *White*, 617.

2. Raising the sash of a window, not shut down close, and held down by its weight only, far enough to admit respondent's body, constitutes a sufficient breaking to render the subsequent entry burglarious. *Id.*

CANCELLATION OF INSTRUMENTS.

1. To warrant the setting aside of a conveyance on the ground of mental incapacity and undue influence and duress, the evidence must be more substantial than sufficient to raise in the mind a suspicion that such conditions existed, a fair preponderance of the proof being necessary in such a case as in any other. *Russell* v. *Carpenter*, 170.

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CANCELLATION OF INSTRUMENTS—Continued.

2. The fact that those entitled to receive the bounty of a decedent have not been equally remembered is not, of itself, sufficient evidence of mental disturbance, or of improper and vicious conduct on the part of those most favored. *Id.*

3. On a bill to set aside a deed and a change in the beneficiary of a benefit certificate, on the ground of mental incompetency and undue influence, evidence examined, and *held*, insufficient to establish that the grantor was incompetent or under restraint or undue influence. *Id.*

4. Where defendant, the owner of an interest in certain lands, fraudulently induced his co-owner to believe he had found a purchaser for the lands, and that the property was less valuable than it was, and induced him to transfer his interest to a third party whom he represented to be acting for the purchaser, but who speedily transferred to defendant's wife, the transaction was fraudulent, and properly set aside. *Lewis* v. *Jacobs*, 664.

See WILLS (2).

CARRIERS.

1. In an action by a passenger against a carrier for wrongful ejection on refusal to honor a mileage ticket, it is incumbent upon plaintiff to prove that he had a valid mileage ticket, good for transportation according to its terms over the defendant's road. *Johnson* v. *Michigan United Railways Co.*, 65.

2. The acts of conductors in permitting passengers to ride upon expired tickets, or upon tickets good only upon certain trains, though often repeated, do not estop the carrier to thereafter deny the passenger's right to transportation contrary to the terms of his contract. *Id.*

3. In an action by a passenger for wrongful ejection and refusal to honor a mileage ticket, not issued by defendant nor its immediate predecessor, but which defendant is shown to have honored without question for several months, evidence examined, and *held*, sufficient to sustain a verdict for plaintiff, especially as defendant offered no explanation of its apparent assumption of the contract and the facts were peculiarly within its knowledge. *Id.*

4. Though there was no direct evidence to connect defendant with the company appearing by the face of the ticket to have issued it, evidence by plaintiff that he had traveled over defendant's road frequently between the date of defendant's acquisition of the road and the date of his ejection, and that the validity of his ticket was never questioned, is admissible on the issue whether defendant had assumed the contract. *Id.*

CERTIORARI.

Certiorari is inappropriate to review rulings of a justice of the peace on the admission of testimony of an inconclusive character, appeal being the proper remedy in such cases. *Foster* v. *Watson*, 400.

See APPEAL AND ERROR (8); DRAINS (2); EMINENT DOMAIN (2); MUNICIPAL CORPORATIONS (9).

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CHANCERY COURTS—See EXECUTORS AND ADMINISTRATORS (1); WILLS (1).

CHANCERY JURISDICTION—See JUDICIAL SALES (1).

CHANCERY SALES—See JUDICIAL SALES (3, 4).

CHATTEL MORTGAGES.

1. Defendant having seized plaintiff's logs on a chattel mortgage and sold them in two lots for $7,718.48, the debt and expenses amounting to $7,051.71 in addition to services of the value of $700 to $800, an instruction holding it liable as for an excessive sale was erroneous, liability in such a case extending only to the surplus, if any, left after the debt and expenses are paid; the mortgagee not being required to sell the logs one by one until enough is realized to pay the debt and expenses, but being entitled to sell in quantity. MOORE, J., dissenting, on the ground that upon the case made by the record the instructions as a whole were sufficiently favorable to defendant. *Croze* v. *St. Mary's Canal Mineral Land Co.*, 363.

2. In an action against the mortgagee of logs for negligence in caring for them after taking possession for the purpose of foreclosure, defendant is entitled to an instruction that it is not liable to plaintiff for its acts with respect to certain logs belonging to third persons which appear to have been intermingled with the mortgaged logs. MOORE, J., dissenting, on the ground that upon the case made by the record the instructions as a whole were sufficiently favorable to defendant. *Id.*

3. Where logs covered by a chattel mortgage were commingled by the owner with others not so covered, belonging to a third person, the mortgagor *held* not entitled to an instruction authorizing the recovery of damages against the mortgagee taking possession of the entire quantity for the purpose of foreclosure and negligently losing a part of them in transporting them to the place of sale, without showing what proportion of the logs so lost belonged to the several owners. MOORE, J., dissenting, on the ground that upon the case made by the record the instructions as a whole were sufficiently favorable to defendant. *Id.*

4. Where, in an action against a chattel mortgagee of logs for damages arising from foreclosure, there is testimony tending to support plaintiff's claim that after the debt and all reasonable expenses were satisfied there was a balance left, and that a large quantity of the logs were lost by defendant's negligence in transporting them to market, the court did not err in refusing to direct a verdict for defendant. *Id.* 864.

5. In an action against a chattel mortgagee of logs for negligence in keeping and transporting them to market after seizure for the purpose of foreclosing, evidence examined, and *held*, that whether there was any loss of logs, and whether such loss was caused by the negligence of defendant in storing them in unsafe booms, and in attempting to tow them to market

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CHATTEL MORTGAGES—Continued.

at a time of year when it was unsafe, were questions for the jury. *Id.*

See LANDLORD AND TENANT (1).

COLLATERAL ATTACK—See JUDGMENTS (7).

COMMON COUNTS—See ASSUMPSIT.

CONFESSIONS—See CRIMINAL LAW (2, 4, 5).

CONSPIRACY.

1. An information which charges a conspiracy "to commit extortion of and from" a named person is sufficient, notwithstanding the failure to use the words "the offense of" or "the crime of" immediately preceding the word "extortion," since the word "extortion" includes within it the idea of crime as much as though the conspiracy were alleged to be to commit any other well known crime. *People* v. *Lamb*, 675.

2. In a prosecution of an attorney and a justice of the peace for conspiracy to commit extortion, evidence examined, and *held*, sufficient to support a conviction for having demanded and received of the defendant in a bastardy case grossly excessive costs. *Id.*

CONSTITUTIONAL LAW.

1. Act No. 21, Pub. Acts 1905, conferring power upon the boards of supervisors of certain counties to add to the conditions to be complied with as prerequisites to the construction and repair of drains, is not an unconstitutional delegation of legislative power to boards of supervisors, but is a valid delegation of control over a local matter authorized by section 36, article 4, of the Constitution. *Chandler* v. *Heisler*, 1.

2. A resolution of the board of supervisors of a county, adopted pursuant to Act No. 21, Pub. Acts 1905, providing that no expenditure for a drain shall be authorized until permission in writing shall be signed by a majority of the members of the township boards affected thereby, is not invalid as an attempt by the board of supervisors to delegate to the township boards the authority reposed by the statute in the supervisors, but is a valid legislative protection of township rights. *Id.*

3. That the authority to withhold their assent to the proceedings is conferred upon the members of the township board, instead of upon the board, is immaterial, since the power is not of a legislative character, and the members in giving or withholding their assent act as business agents of the township. *Id.*

4. Act No. 329, Pub. Acts 1905, invalidating agreements not to engage in a particular employment, except when ancillary to a sale of a business, does not conflict with the 14th Amendment of the Federal Constitution, by prohibiting the making of reasonable contracts for the protection of one's business. *Grand Union Tea Co.* v. *Lewitsky*, 244.

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CONSTITUTIONAL LAW—Continued.

5. That the members of the legislature voted for a bill repealing a special charter, previously granted to a private corporation, without investigating the merits, and in compliance with a custom relating to local measures, and in reliance upon the representations of the members from the locality affected to the effect that the delegation from that county were a unit in favor of the bill, and that it did not involve a subject upon which the people of the State were interested, is not admissible to impugn the constitutionality of the repealing act, the motives of the legislature in passing a law not being open to inquiry. *People, ex rel. Ellis*, v. *Calder*, 724.

6. The courts conclusively presume that the legislature acts in good faith. *Id.*

7. The repeal, by the legislature, of the special charter of a water company, acting under a reserved power in the charter, cannot be said to violate the obligation of any contract between the water company and the State, nor to deprive it of its property without due process of law, nor to take its property for public use contrary to section 2, article 18, of the Constitution. *Id.*

8. The constitutional rights of the holders of the bonds of a private corporation are not impaired by the repeal of the corporation's charter, in accordance with a reserved power in the charter, since the franchises mortgaged to secure the bondholders are no other or different than those granted to the corporation. *Id.* 725.

See CORPORATIONS (7, 8); COURTS (3); CRIMINAL LAW (12); EMINENT DOMAIN (5); INTOXICATING LIQUORS (2); STATUTES (4); TOWNSHIPS (3).

CONTRACTS.

1. A contract of employment by which the employé agrees not to engage in business in the employer's line for one year after leaving the employment is invalid as contrary to the express terms of Act No. 329, Pub. Acts 1905. *Grand Union Tea Company* v. *Lewitsky*, 245.

2. In an action for breach of certain contracts by which plaintiff agreed to cut and manufacture the timber on certain lands which defendant represented to belong to him, the breach consisting in failure of defendant's title to the land, evidence examined, and *held*, that there was sufficient testimony, if believed, to go to the jury on the issue how much timber was cut under the several contracts before plaintiff was stopped by the owner of the lands. *Mott* v. *Penoyar*, 273.

3. Where defendant employed plaintiff to cut and manufacture the timber standing on certain lands, which defendant falsely represented belonged to him, plaintiff was entitled to damages for the breach of the contract, and the amount of timber cut before plaintiff was stopped by the owner of the land was an element of the damages to be considered, regardless of the terms of the contract as to the time of payment. *Id.*

4. In an action for breach of a contract by which plaintiff was

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CONTRACTS—Continued.

employed by defendant to cut the timber on certain lands, which defendant falsely represented belonged to him, the rejection of certain title deeds and bills of sale, which defendant claimed would establish his title to a part of the lands, was not error, there being no claim of title to the whole. *Id.* 274.

5. The papers were not admissible as tending to show defendant's good faith, since good faith would not relieve him from the consequences of his want of title. *Id.*

See ACTION (1); ASSUMPSIT (2); CARRIERS (1); CONSTITUTIONAL LAW (4); CORPORATIONS (1–5); FALSE PRETENSES (1); MUNICIPAL CORPORATIONS (2); SALES (1, 2); STATUTES (3); WORK AND LABOR (1–4).

CONTRIBUTION—See LIMITATION OF ACTIONS.

CONTRIBUTORY NEGLIGENCE — See ANIMALS (2); APPEAL AND ERROR (2); MASTER AND SERVANT (17, 29, 39); RAILROADS (1, 2).

CORPORATIONS.

1. No ratification of an unauthorized contract of employment made by the secretary-treasurer and manager of a corporation with plaintiff appears where, upon the first discovery of the existence of the contract by the corporation, its validity was questioned, and plaintiff understood that his continued employment was not in recognition of the validity of the contract. *Laird* v. *Michigan Lubricator Co.*, 52.

2. Under section 7040, 2 Comp. Laws, the secretary-treasurer of a corporation and manager of its business under direction of the board of directors, whose term of office is one year, has no implied authority to bind the corporation by a contract of employment of a clerk for a period of three years, and there being no evidence of any custom of the corporation or of a holding out of the secretary-treasurer as having that authority, the contract is unenforceable. *Id.*

3. Whether, under section 6995, 2 Comp. Laws, a contract made by the organizer and principal stockholder of a corporation, prior to the filing of the articles of association and payment of the franchise fee, will bind the corporation, is immaterial in a case in which the corporate organization as actually executed was a mere cover for the organizer, under protection of which it was designed he should individually conduct the business, and he recognized the contract after incorporation and agreed to carry it out. *Ruttle* v. *What Cheer Coal Mining Co.*, 300.

4. Where the directors of a corporation, who comprised the entire body of its stockholders, permitted the principal stockholder, who held the offices of president, treasurer, and general manager, to exercise all of their functions and to assume the entire control and management of the corporate affairs, the corporation, having received the benefit of services performed under contract with him, is as much bound as though it had itself formally contracted for the services. *Id.*

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CORPORATIONS—Continued.

5. In an action against a corporation for the value of services performed, a claim that because plaintiff was a stockholder, secretary and a director of defendant the law presumes, in the absence of an express contract, that his services were gratuitous, and there could be no recovery on an implied contract, is not tenable, where plaintiff was merely a nominal stockholder and received no compensation as an officer. *Id.*

6. Where, in an action against a corporation for the value of services performed in superintending defendant's operations, plaintiff testified that the services were worth $5,000, stated their character, and in a general way what he did, and was cross-examined at length, and the services were of such a character that it would be difficult to place a value upon the several items, there was sufficient evidence of their value to go to the jury. *Id.* 301.

7. An objection to a law repealing the charter of a corporation that notice was not given as required by section 16, article 15, of the Constitution, is untenable, where it appears that notice was given to the legislature of the member's intention to introduce the bill, as required by sections 8569–8571, 3 Comp. Laws, and that, though the officers of the corporation were not formally notified, they had knowledge of the pending bill and were given a hearing by the governor and denied a hearing by each house of the legislature. *People, ex rel. Ellis,* v. *Calder,* 724.

8. Section 16, article 15, of the Constitution, providing for notice of an application for an alteration of the charter of any corporation, has no application to the repeal of a charter. *Id.*

See CONSTITUTIONAL LAW (7, 8); EMINENT DOMAIN (5); ESTOPPEL (2); FRAUD (2); INSURANCE (1); PLEADING (3).

CORPUS DELICTI—See CRIMINAL LAW (2, 3).

COSTS.

The modification of a decree on appeal being substantial, the appellant was awarded costs of the appeal. *Draper* v. *Brown,* 122.

See EXECUTORS AND ADMINISTRATORS (7); MECHANICS' LIENS.

COUNTIES—See CONSTITUTIONAL LAW (1, 2).

COURTS.

1. Mere failure of the court in a decision to apply an applicable rule of law announced by previous decisions, the rule not being discussed nor considered, casts no doubt upon the correctness of the rule. *Foster* v. *Watson,* 400.

2. It is within the power of the legislature to confer jurisdiction upon the circuit court in cases involving any amount. *Detroit Lumber Co.* v. *Auxiliary Yacht "Petrel,"* 528.

3. Under section 18, article 6, of the Constitution, the legislature has the power to withdraw any cause from the jurisdiction of justices of the peace. *Id.*

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COURTS—Continued.

4. A statement in an opinion of the court which is properly characterized as dictum is entitled to no greater weight than would be given it as an expression of an opinion of the justice writing the opinion. *Id.*

5. An interpretation by the highest court of another State of the laws of that State with respect to the charter, laws, and contracts of a beneficial association organized there, is binding upon the courts of this State as to the construction of a similar contract which by its terms is subject to those laws. *Knights of Columbus* v. *McInerney*, 574.

6. Authority to correct purely clerical errors in their records is inherent in courts of general jurisdiction. *Walsh* v. *Colby*, 602.

See ACTION (2); EXECUTORS AND ADMINISTRATORS (1); MARITIME LIENS.

COVENANTS.

1. In this State a covenant against incumbrances is personal and does not run with the land. *Pease* v. *Warner*, 140.

2. A right of action for breach of the covenant against incumbrances does not pass by deed of the land. *Id.*

3. If a covenant against incumbrances in a deed which excepts a certain mortgage, "to be paid on or before five years from" the date thereof, can be construed as a covenant that the mortgage cannot be foreclosed before that time, such covenant will not run with the land, and a subsequent grantee, taking from one who assumed the mortgage debt, cannot, on a bill by the mortgagee to foreclose for a default in the payment of interest agreed to be paid by the mortgagor, have specific performance of the covenant in the mortgagor's deed, by compelling him to satisfy the mortgagee's claim, and await the expiration of the five years before foreclosing. *Id.*

CRIMINAL LAW.

1. The defendant in a criminal case is not entitled to an instruction, there being no testimony upon the subject, that he is presumed to be a man of good character. *People* v. *Kemmis*, 117.

2. It is the general rule that the corpus delicti may not be proved by the naked extrajudicial confession of accused. *People* v. *Ranney*, 293.

3. Logically the corpus delicti includes only the fact of the specific loss or injury sustained, though some of the cases hold that it also includes the fact of someone's criminality as the source of the loss. *Id.*

4. The corroboration of accused's extrajudicial confessions necessary to establish the corpus delicti refers to facts which concern the corpus delicti, facts tending merely to produce confidence in the truth of the confession not being sufficient. *Id.*

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CRIMINAL LAW—Continued.

5. In a prosecution for false pretenses in procuring funds on a worthless check, evidence examined, and *held*, that though there was no evidence that the check was worthless other than the fact that it had been forwarded in the usual course of business to a distant State and returned unpaid, there was sufficient corroboration of respondent's confessions to support a conviction, assuming that the corpus delicti includes not only the fact of the specific injury, but the element of someone's criminality as the source thereof. *Id.*

6. Counsel for respondent, before learning the nature of the testimony to be elicited from a new witness, stated that he would need time to send to New York to find out a fact, but, upon learning the fact to be proved by the witness, said that his position was that the fact was immaterial, and no motion for time was made. *Held*, that it was not error to indorse the name of the witness on the information and permit him to testify. *Id.*

7. A statement made by the prosecuting attorney, in argument, to the effect that respondent was committing adultery every day, the purpose being to discredit him because of his immorality, was not prejudicial, though there was no proof that either respondent or the woman with whom he was traveling was married, where it appeared that they were registered at hotels as man and wife and were not married. *Id.* 294.

8. The defendant in a criminal case has no absolute right to a change of venue; such right depending upon a showing of cause. *Glazier* v. *Ingham Circuit Judge*, 481.

9. Where the showing made to secure a change of venue in a criminal case is met by counter affidavits which call for the exercise of the sound judgment and discretion of the circuit judge, his decision ought not to be disturbed by this court by mandamus except in case of a clear abuse of discretion. *Id.*

10. Where the most of the showing in support of a motion for a change of venue in a criminal case would apply to all the populous counties of the State, and the showing of actual prejudice is met by counter affidavits which call for an exercise of sound judgment on the part of the circuit judge, no abuse of discretion in denying the motion appears. *Id.*

11. Where the trial court has imposed an illegal sentence, it has the power to substitute for it a legal sentence, notwithstanding the illegal sentence has been partly executed. *In re Vitali*, 514.

12. Though the trial court in a criminal case may inform the jury that, under the evidence, they should render a verdict of guilty, he may not compel them to render such a verdict; and an instruction that "you should find a verdict of guilty as charged, without leaving your seats, and the clerk will take the verdict," violates the constitutional right of trial by jury. *People* v. *North*, 612.

See BURGLARY; CONSPIRACY; INTOXICATING LIQUORS (5).

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CROSS EXAMINATION—See EVIDENCE (14); WITNESSES (3, 5).

CUSTOM—See MASTER AND SERVANT (24).

DAMAGES.

1. A declaration in an action for personal injuries alleging that plaintiff was "greatly injured and bruised internally" will permit proof of permanent injuries to the uterus, not otherwise specifically alleged. *Groat* v. *Detroit United Railway*, 165.

2. In an action for personal injuries consisting among others, of injury to the spinal cord and nerves, evidence examined, and *held*, that an instruction that there was no evidence of the injuries stated, and that plaintiff was suffering only from a functional and not an organic disorder, was properly refused. *Id.* 166.

3. In an action for damages resulting from personal injuries, it may be shown by the attending physician that he advised complete rest, that medication was not required, and that frequent visits would not be necessary, as explaining why, the injury being serious, the calls of the physician were infrequent. *Buxton* v. *Ainsworth*, 315.

4. In an action for personal injuries, plaintiff's habits of industry may be shown. *Id.* 316.

5. Where plaintiff, suing for damages for a personal injury consisting of the loss of two fingers of his right hand, was 16 years old at the time of the injury, and was injured on the second day of his employment with defendant, the first he ever had, he had acquired no status as a wage earner, and it was not error to refuse an instruction that as a matter of law there was no evidence that plaintiff's injuries had "affected his ability to earn money." *Clemens* v. *Gem Fibre Package Co.*, 497.

6. Where a boy of 16, suing for damages for a personal injury consisting of the loss of two fingers of the right hand, recovered a verdict of $1,500 under an instruction to award such an amount as would fairly compensate him for his injury, the amount awarded is not unreasonable aside from any loss of earning power; and if any error was committed in refusing an instruction not to include any damages for loss of earning power, such error was not prejudicial. *Id.*

7. The measure of damages for the destruction by fire, set by defendant railroad company's engine, of logs piled along its right of way for shipment to a mill to be manufactured into shingles, is the value of the logs plus the rental value of the mill during the period the owner lost its use through the burning of his logs; the element of loss of profits being too uncertain for submission to the jury. *Quay* v. *Duluth, etc., R. Co.*, 567.

8. In an action by a minor for personal injuries, instructions examined, and *held*, not open, when construed as a whole, to the objection that they permitted the jury to award damages for plaintiff's earning capacity for the period interven-

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DAMAGES—Continued.

ing the trial and the time when he should reach majority, a time during which his earnings belonged to his father. *Braasch* v. *Michigan Stove Co.*, 653.

9. An award of $4,000 to a boy of 14 for having his foot crushed between the floor of an elevator and the floor of the building, *held*, not so excessive as to require reversal or make it error to deny a new trial. *Id.*

See APPEAL AND ERROR (6); CHATTEL MORTGAGES (3); CONTRACTS (3); FRAUD (1); INJUNCTION (8); MASTER AND SERVANT (20); NEGLIGENCE (4); PLEADING (2); PROCESS.

DEEDS.

1. A husband owning a fee in land, and his wife owning an inchoate right of dower therein, may give a conveyance that passes the title in fee, or may impose any limitations they see fit; whence they may reserve a life estate to themselves and the survivor of them. *Engel* v. *Ladewig*, 8.

2. A deed containing the words "grant, bargain, sell and confirm" and the covenants of warranty and seisin in common use in warranty deeds, reserving to the grantors "all right, title and control so long as we or either of us shall live" and directing that the grantee shall pay "out of the above described real estate" certain sums to the grantors' children, creates a life use for the grantors, and provides a lien upon the land for the payment of the sums mentioned. *Id.*

3. Where a husband prepared, signed, and acknowledged certain deeds naming his wife as grantee, and kept them in his own possession for several years, and on the eve of departing on a journey handed them to his wife with instructions that if anything of a fatal nature should befall him she should have them recorded, which she did forthwith, though he returned in safety, there was a sufficient delivery to pass title to her, since he reserved no right to recall the deeds. *Wipfler* v. *Wipfler*, 18.

4. Where a husband bought property with his own funds, taking deeds therefor naming his wife as grantee, the delivery of the deeds to him was sufficient to vest the title in her. *Id.*

5. On a bill to re-establish a deed, admitted to have been executed by defendant to his wife, since deceased, as grantee, but claimed to have never been delivered, the fact that defendant, after her death, obtained from complainant, her sole heir and legatee, a quitclaim deed "for the purpose of perfecting the title" on account of the "unrecorded" deed, is not conclusive of the fact of delivery of the original deed, but is, at most, a circumstance to be considered in determining whether there was a delivery. *Draper* v. *Brown*, 120.

6. On a bill by the sole heir and legatee of a testatrix against her surviving husband to restore a deed, admitted by him to have been executed in her favor, but never delivered, evidence examined, and *held*, that complainant has not, by a preponder-

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DEEDS—Continued.

ance of the evidence, aided by the presumptions the court is bound to indulge, established the fact that testatrix died seised of the property in question. *Id.* 121.

7. Where a landowner conveyed the land to her agent for the purpose of facilitating the transaction by which they were defrauded, and on discovery of the fraud the agent repudiated the conveyance by which he transferred the land to defendant's agent, and reconveyed to his principal, the acceptance by the principal of her agent's deed of reconveyance will be presumed. *Lewis* v. *Jacobs*, 664.

See CANCELLATION OF INSTRUMENTS (1, 3, 4); FALSE PRETENSES (1); REFORMATION OF INSTRUMENTS.

DETROIT CHARTER—See INTOXICATING LIQUORS (1); MUNICIPAL CORPORATIONS (2–12).

DICTUM—See COURTS (4).

DRAINS.

1. Where a resolution of a board of supervisors, adopted pursuant to Act No. 21, Pub. Acts 1905, provides that no expenditure for a drain shall be authorized until permission in writing shall be signed by "at least a majority of the members of the township board or boards affected by" the proceedings, a majority of the members of each board affected is necessary, a majority of the members of the several boards collectively not being sufficient. *Chandler* v. *Heisler*, 1.

2. A bill in equity will lie to restrain the construction of a drain on the ground that requirements prescribed by the board of supervisors pursuant to Act No. 21, Pub. Acts 1905, have not been complied with, since the proceedings to establish the drain may be regular and not open to the certiorari provided by the general drain law, and still there be no compliance with the supervisors' requirements. *Id.* 2.

3. Owners of lands not traversed by a proposed drain, and who are therefore not parties to the proceedings, have a remedy in equity by injunction to restrain the construction of the drain where its effect will be to cast upon their land waters for which no outlet has been provided. *Smafield* v. *Smith*, 270.

4. Owners of lands along a natural watercourse which has been improved at public expense for the purpose of furnishing an outlet for proposed drains, cannot enjoin the construction of such drains where it does not appear that their effect will be to flood complainants' lands beyond the degree contemplated when the stream was improved, or beyond the extent to which they were previously flooded. *Id.*

5. Under section 8787, 3 Comp. Laws, one who has an estate for life in lands is a freeholder within the meaning of section 4319, 2 Comp. Laws, providing that an application for a drain must be signed by not less than 10 freeholders. *Bakker* v. *Fellows*, 428

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DRAINS—Continued.

6. Where a father, after promising to buy his son a farm in O. township, bought land there, taking title in himself, and afterward told the son that it was his (the son's) farm, and the son took and retained possession, cultivating the land, building buildings, and paying the taxes, the son had in equity a right to the premises in fee, and was therefore a freeholder, under section 4319, 2 Comp. Laws, providing that an application for a drain must be signed by not less than 10 freeholders. *Id.*

7. One who is an equitable owner of land by virtue of part performance of an oral promise to convey, consisting of possession and the making of improvements, is an owner, under section 4319, 2 Comp. Laws, providing that an application for a drain must be signed by five or more owners of lands liable to assessment for benefits. *Id.*

See CONSTITUTIONAL LAW (1, 2); TRIAL (15, 16).

DRUGGISTS—See INTOXICATING LIQUORS (5).

EASEMENTS.

1. Defendant does not show a prescriptive right to cross complainant's land to reach his own, by showing that from 1888 to 1906 he has, at intervals, crossed one or other or both of complainant's parcels, and that as late as 1892 he sought, without success, to bargain for a way, and that such use as he made of the land in crossing it was at that time permissive; that since that time the way has been repeatedly obstructed, which obstructions he has removed. *Moore* v. *Bulgreen*, 261.

2. Assuming that a way originally by permission may in some cases become one of right by hostile use, the period when it was used by permission cannot be tacked on to the period of hostility for the purpose of making the statute period. *Id.*

3. An allegation in a bill to restrain the use of a claimed right of way that defendant "has not now, and never had any right of way, * * * either by prescription, license, or easement," does not require the court to assume that from the beginning defendant's use of the land was adverse. *Id.*

4. Title to an easement may be acquired by prescription in the same time as required in the case of land. *Dummer* v. *United States Gypsum Co.*, 622.

5. Title or rights in lands founded on prescription originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner, by his acquiescence, has granted the land, or interest in the land, so held adversely; and where it appears that the claimant of an easement and his predecessors did not at any time before the interference complained of make uninterrupted use of the claimed easement for the statutory period of 15 years, the claim of prescriptive easement fails. *Id.*

See FRAUDS, STATUTE OF (3).

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EJECTMENT.

1. Where, in an action of ejectment to recover a strip of land along the boundary between plaintiff and defendant, the undisputed evidence showed an original location of a boundary line fence by adjoining owners and an adverse occupation of the land on each side of the line down to the removal of the fence by defendants, with all the elements of adverse possession, and the only disputed question is how far defendants moved the fence, questions asked of plaintiff's predecessors in title whether they ever had any idea of claiming title to any land beyond the true boundary line were purely academic and properly refused. *Cudney* v. *Sherrard*, 239.

2. Where a declaration in ejectment described the entire piece of land owned by the plaintiff, only a small portion of which was involved in the suit, an amendment describing particularly the disputed piece was properly allowed. *Hartz* v. *Detroit, etc., Ry.*, 337.

3. Title by prescription is a complete title, and will sustain an action of ejectment as well as a record title. *Dahlem* v. *Abbott*, 465.

4. Where plaintiff in ejectment shows that her ancestor took possession with her family nearly 40 years ago under certain deeds introduced in evidence, and that her heirs have remained continuously in possession ever since, there is sufficient evidence of title by prescription to sustain a verdict. *Id.*

5. The acquisition of a tax deed by a tenant in common, claim made thereunder, and the statement of the co-tenant in possession that she holds under the tax title holder in consequence of the tax title, are sufficient evidence of ouster of another co-tenant to support ejectment. *Id.*

See ADVERSE POSSESSION (1).

ELECTRICITY—See EVIDENCE (1); MASTER AND SERVANT (1, 3, 4, 11, 12).

ELEVATORS—See EVIDENCE (13).

EMINENT DOMAIN.

1. There is a well-defined distinction between the definitions of the words "railroad" and "street railway," the former being a word of general and extended meaning, applying to all roads incorporated under the general law, and the latter being local in its signification, referring to transportation of a character entirely different from that of a general railroad; the former has always been held to impose an additional servitude upon a public way for which the abutting owners were entitled to compensation, while the latter has been held to add no such burden. *Township of Ecorse* v. *Jackson, etc., Ry.*, 393.

2. The determination of the court upon the issue which may be raised in conformity with the provisions of section 6245, 2 Comp. Laws, may be reviewed by certiorari, whatever the form

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EMINENT DOMAIN—Continued.

in which cause is shown of record; but, the proceedings being summary, and dilatory proceedings not being favored, it is not contemplated that cause shall be shown by a series of special pleadings, the decision upon each of which may be separately reviewed. *Chicago, etc., R. Co.* v. *Grand Rapids, etc., R. Co.*, 686.

3. The court declines to say that a railroad company may not own land, other than that excepted in section 6242, 2 Comp. Laws, which is subject to be condemned by another railroad company for use as a way for its tracks. *Id.*

4. A petition by a railroad company, to condemn lands belonging to another railroad company, which avers the facts required by section 6242, 2 Comp. Laws, is sufficient, it being the duty of the landowner to bring before the court the facts relied upon to defeat the showing, rather than the duty of the petitioner to negative, or state by way of exclusion and inclusion, every fact and theory upon which the owner might rely to show the property to be exempt. *Id.* 687.

5. Where a statute repealing the charter of a water company gave the company the right to present a claim for the value of its tangible property to the common council of the city wherein it was situated, an objection that the provision is unconstitutional because (*a*) it permits property to be taken for the public without the determination of necessity as provided in the Constitution; and (*b*) that the compensation provided is unlawful and inadequate; is untenable, where the provision is merely permissive, and if the corporation accepts, it voluntarily sells its property on the terms stated in the provision. *People, ex rel. Ellis*, v. *Calder*, 725.

See TRIAL (15, 16).

EQUITY.

He who seeks equity should do equity. *G. F. Sanborn Co.* v. *Alston*, 457.

See ACTION (2); DRAINS (2); EASEMENTS (3); EXECUTORS AND ADMINISTRATORS (1); INJUNCTION (1–4, 9); JUDICIAL SALES; REFORMATION OF INSTRUMENTS; TAXATION (5); WILLS (1).

ESTATES—See WILLS (3).

ESTOPPEL.

1. Where an executor and trustee under a will had no right to use the income from one trust fund to preserve another, but the beneficiary for life of both funds knew of his doing so and made no objection, she is estopped to thereafter complain of his action in so doing. *Draper* v. *Brown*, 122.

2. An objection to the enforcement of a statute repealing the charter of a water company, on the ground that it was passed in consequence of the wrongful conduct of certain officers of the city affected, is untenable in a case in which the repealing act is sought to be enforced, not for the benefit of the officers whose conduct was wrongful, but for the ben-

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ESTOPPEL—Continued.

efit of the entire inhabitants of a city who were guilty of no wrong. *People, ex rel. Ellis*, v. *Calder*, 725.

See CARRIERS (2); TAXATION (4).

EVIDENCE.

1. Electricity is to be classed with gunpowder, dynamite, and other dangerous and treacherous and destructive agents, of whose dangerous qualities courts take judicial notice, as well as of the fact that society recognizes them and acts accordingly. *De Kallands* v. *Washtenaw Home Telephone Co.*, 26.

2. A witness who had worked around sawmills all his life, had worked ten years as a filer, and had filed saws in a mill in which plaintiff was employed as a sawyer two years, was competent to express his opinion as to plaintiff's competency as a sawyer. *Alexander* v. *Mud Lake Lumber Co.*, 70.

3. Where a letter previously written by a witness is offered in evidence as containing a statement by defendant upon which complainant relies as an admission, its competency depends primarily upon the ability of the writer to guarantee that it accurately represents his knowledge and recollection at the time; and where the writer has no independent recollection of the matter, and the letter does not aid or refresh his recollection, it is not competent. *Draper* v. *Brown*, 120.

4. A letter written by an agent to his principal, regarding a loan applied for by defendant, wherein it is stated "He [defendant] offers his wife's mortgage on the house and lot he occupies," is not admissible as an admission by defendant that the title to the property was in his wife, the issue being whether a deed, admitted to have been executed in her favor, was ever delivered. *Id.*

5. Upon summary proceedings to obtain possession of leased premises for nonpayment of rent reserved by written lease, defendant cannot show a verbal modification of the lease postponing the time of payment. *Goebel* v. *Look*, 204.

6. In an action for damages resulting from an injury suffered in a collision between vehicles on a highway, a witness who had been called to the place of the collision by plaintiff and had the place pointed out to him was asked in effect whether there was room for defendant to pass. *Held*, that if the question was objectionable as calling for witness' opinion on a question of fact, the answer was not so, where he stated that there was no object that would keep the vehicle from passing, that it was not a good road (a conclusion in defendant's favor), and that if the location of plaintiff's buggy was as pointed out to him, there would have been ample room, namely, nine feet of good road. *Buxton* v. *Ainsworth*, 815.

7. A question to defendant's father whether he knew anything about defendant deeding his land to witness just before judgment was rendered at a previous trial of the case, if objectionable as an attempt to show by parol a conveyance of land, is harmless, where the witness had just stated that he claimed to own everything defendant had. *Id.* 816.

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EVIDENCE—Continued.

8. In a personal injury case it is not error to refuse to compel plaintiff's physician to state, on cross-examination, what treatment he gave, on the theory that the treatment might have had something to do with her condition, since, if the treatment had not been proper, that fact would not lessen defendant's liability. *McIntyre* v. *Murphy*, 342.

9. Where a witness was beyond the jurisdiction of the court, his testimony taken at a former trial of the case was properly admitted. *Croze* v. *St. Mary's Canal Mineral Land Co.*, 864.

10. Where the secretary-treasurer of defendant corporation and the superintendent of its factory testified that a certain person was employed to look after certain machines, the corporation cannot contend that that person is not qualified to testify as an expert regarding the condition and operation of the machines. *Clemens* v. *Gem Fibre Package Co.*, 496.

11. Failure of the defendant in a divorce case to deny statements contained in a deposition, of the taking of which she had notice, cannot be taken as an admission that such statements were true, where the controversy was being tried by a court of another State which had no jurisdiction because of the nonresidence of the parties. *O'Dell* v. *Goff*, 643.

12. The issues being such that contestant could not prevail without convincing the jury that his mother was in fact chaste, the fact that there was no evidence of lack of chastity, and that contestant might, if he chose, rely upon the presumption of chastity, affords no ground for ruling that affirmative proof of chastity was inadmissible. *Id.* 644.

13. Though it was incompetent to call an expert to prove that an electric freight elevator was a place of danger to life and limb, that being a question of fact which the jury were as competent to decide without expert evidence as with it, the error in doing so was harmless in a case where plaintiff, a boy of 14, lost his foot in consequence of placing it over the edge of the floor of the elevator, since the court will judicially notice that a freight elevator is a place of danger to life and limb in the hands of an inexperienced boy of 14. *Braasch* v. *Michigan Stove Co.*, 652.

14. Where, in an action against the principal and sureties on a township treasurer's bond, defendant treasurer claimed credit for moneys paid on account of school taxes, which the school district treasurer claimed he had already had credit for, defendants cross-examined at length a witness as to what the school treasurer claimed with respect to the matter at a meeting of the township officers, the school treasurer was properly permitted to state the conversation, over the objection that defendants were not present. *Township of Alpena* v. *Mainville*, 782.

15. Where a paper claimed to be that upon which the school and township treasurers cast up their account at the time of coming to a settlement at a bank had been introduced in evidence as an exhibit, the cashier of the bank was properly permitted to testify that at the time in question scratch pads contain-

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EVIDENCE—Continued.

ing leaves of similar color and size were in use at the bank. *Id.* 733.

See BILLS AND NOTES; CANCELLATION OF INSTRUMENTS (1, 2); CARRIERS (3, 4); CONTRACTS (4, 5); CRIMINAL LAW (1, 4, 5); DAMAGES (3, 4); DEEDS (5); EJECTMENT (1, 4); FALSE PRETENSES (2, 3); FRAUD (4); HARMLESS ERROR; HIGHWAYS AND STREETS (4); INTOXICATING LIQUORS (8); MASTER AND SERVANT (21, 34); NEGLIGENCE (2, 4); RAILROADS (3); RAPE; SAVING QUESTIONS FOR REVIEW (3, 8); TRIAL (1, 18); WILLS (5); WITNESSES (5); WORK AND LABOR (6).

EXAMINATION OF WITNESSES — See EVIDENCE (14); WITNESSES (5).

EXCEPTIONS—See APPEAL AND ERROR (15); SAVING QUESTIONS FOR REVIEW (1, 5).

EXECUTION.

Where, prior to the levy of an execution on certain lands as the property of complainant, he had conveyed the same by quit-claim deed, taking a mortgage for a part of the purchase money, which deed was, but the mortgage was not, recorded at the time of the levy, complainant's interest in the land was an equitable one, within the meaning of section 9167, 3 Comp. Laws, and the failure of the execution creditor to take proceedings to determine complainant's interest within one year, as provided by the statute, rendered the levy and sale ineffective; and complainant having subsequently taken possession under his mortgage, the levy and sale constituted a cloud upon his title which he was entitled to have removed upon a bill filed for that purpose. *Gordon* v. *Township of Burleigh*, 493.

EXECUTORS AND ADMINISTRATORS.

1. It is not the province of a court of equity to allow or disallow claims against the estates of deceased persons, or to administer estates; especially after the subject has been entered upon in the probate court. *Draper* v. *Brown*, 121.

2. A will by which testator devised certain mortgaged land to her executor in trust, income payable to her daughter for life, remainder to certain other persons, and the residue of her estate to her executor in trust, income payable to her daughter for life, remainder to persons other than the remaindermen in the preceding paragraph, considered, together with the surrounding circumstances, among them being the fact that the estate, aside from the mortgaged property, was insufficient to pay the mortgages, and *held*, that testatrix did not, by a general direction to pay her debts, direct her executor to pay the mortgages, and that no duty devolved upon him so to do. *Id.*

3. Where a will does not devolve upon the executor the duty of paying mortgages upon real estate, but shows a contrary intention, and the mortgage debts are not provable, or not

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EXECUTORS AND ADMINISTRATORS—Continued.

proved, against the estate, the executor cannot pay them. *Id.*

4. The policy of our law, as declared in the statutes (sections 9375, 9380, 3 Comp. Laws) and by the court, is to commit allowance of claims against estates to a commission, to refuse allowance of demands barred by the statutes, and to confine the administrator to the payment of claims duly allowed; whence payments by an executor of interest upon mortgages upon real estate belonging to his testatrix, whatever effect they may have to preserve the lien of the mortgages, do not operate to suspend limitations as to the mortgage debt, and the executor or administrator may not by such payments either revive a demand barred by the statute at the decease of the debtor, or admit the liability of the estate upon one otherwise barred. *Id.* 122.

5. This case is ruled by *In re Ward's Estate*, 152 Mich. 218, between the same parties, and involving the same questions. *In re Ward's Estate*, 164.

6. Where ancillary administration proceedings are taken in this State, a claim arising here may be presented here, and the claimant is not obliged to present it in another State to the court having jurisdiction of the principal proceeding. *In re Colburn's Estate*, 207.

7. The legislature did not intend, by the provisions of section 9440, 3 Comp. Laws, to take from the courts the discretion as to costs conferred by section 681, 1 Comp. Laws, and sections 9391, 11275, 3 Comp. Laws; but in cases in which the court makes no special order for costs, in the exercise of its discretion, execution issues against the executor or administrator, in accordance with the provisions of section 9440. *Id.*

8. The interest of an heir in the real estate of his ancestor is not chargeable with his indebtedness to the estate. *Broas* v. *Broas*, 310.

9. An award of alimony is a valid claim against the estate of claimant's divorced husband, deceased, for the time elapsing between the date of the decree and the subsequent remarriage of claimant, where decedent in his lifetime took no steps for a modification of the award. *Martin* v. *Thison's Estate*, 516.

EXTORTION—See CONSPIRACY.

FALSE PRETENSES.

1. In a prosecution for false pretenses, the evidence showed that respondent, being indebted to his father, conveyed to him a half interest in certain real estate as security. Thereafter, at the request of certain other creditors, the father and son conveyed the property to the wife of one of the creditors, taking a contract in the name of the son which provided for payment of the indebtedness and that he should remain in possession of the premises. *Held*, that the title to the property was in the respondent, and that an instruction submit-

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FALSE PRETENSES—Continued.

ting the question of ownership, and the falsity of his representations as to his ownership of the property to the jury as an open one was reversible error. *People* v. *Andre*, 581.

2. In a prosecution for false pretenses inducing a sale of goods on credit, it appeared that respondent referred the complaining witness to a bank, where he had filed a financial statement. The complaining witness, after he had delivered the goods to a carrier for transportation to respondent, and before delivery by the carrier to him, made inquiry of the bank and was informed that respondent had filed a statement showing he was worth a large sum specified above his liabilities and exemptions. *Held*, that the statement, together with evidence that it was false, was admissible as bearing upon respondent's intent in making the representations. *Id.*

3. If the jury found, in accordance with his testimony, that, except for said statement on file in the bank, the complaining witness would have stopped the actual delivery to respondent, they would have been authorized to find that the shipment was made in reliance upon that statement. *Id.*

4. Where, in a prosecution for false pretenses, respondent admitted his insolvency at the time the representations complained of were made, the error, if any, in admitting in evidence a circular, subsequently made by respondent's attorney in involuntary bankruptcy proceedings, showing a statement of respondent's financial condition, was not prejudicial. *Id.* 532.

FALSE REPRESENTATIONS—See FRAUD (5).

FIRE INSURANCE—See INSURANCE (9–11).

FIRES—See DAMAGES (7); RAILROADS (4).

FISH.

The right to fish in navigable waters is a public right, for injury to which an action for damages will lie, or, if the injury be irreparable, or is one for which the law furnishes no adequate remedy, it may be restrained by injunction. *Ainsworth* v. *Munoskong Hunting & Fishing Club*, 186.

FLINT CHARTER—See INTOXICATING LIQUORS (3).

FORCIBLE ENTRY AND DETAINER.

1. Where a vendor, entitled to possession for default of the purchaser, attempts by a display of force to remove the purchaser's goods from the premises, the fact that the vendor and his employés obtained entry into the house without force does not render his conduct any the less a violation of the statute against forcible entries. Section 11153, 3 Comp. Laws. *McIntyre* v. *Murphy*, 342.

2. Where a person not entitled to possession is evicted contrary to the forcible entry and detainer statute, he cannot recover damages for being disturbed in his possession of the land, but

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FORCIBLE ENTRY AND DETAINER—Continued.

he may recover compensation for any injuries done to himself or his personal property in the course of the eviction. *Id.*

FORECLOSURE—See CHATTEL MORTGAGES (1, 4); COVENANTS (3); LANDLORD AND TENANT (1); MECHANICS' LIENS; MORTGAGES (3–5, 7–9).

FOREIGN CORPORATIONS—See INSURANCE (1).

FOREIGN JUDGMENTS—See JUDGMENTS (7).

FORGERY.

Where, through the fraud of a trusted employé, a railroad company issued a warrant naming a fictitious payee, an indorsement of the name of such fictitious payee for the purpose of cashing the warrant was a forgery. *Harmon* v. *Old Detroit Nat. Bank*, 74.

See BANKS AND BANKING (1, 8, 5); BILLS AND NOTES (1).

FRAUD.

1. In an action for fraud in misrepresenting the right of head belonging to a water power sold by defendant to plaintiff, it appeared that on a bill by a landowner against plaintiff, to restrain the maintenance of the dam at the height represented, a decree was rendered giving plaintiff the option of reducing the head a certain amount or paying complainant's damages to be assessed, and that plaintiff elected to reduce the head; whereupon the court directed a verdict for defendant on the ground that by electing to damage the power by reducing the head, when he might have preserved it by paying an inconsiderable amount as damages, plaintiff had lost his right of action. *Held*, error, since plaintiff's right of action accrued at once when the representation was made and proved to be false, and the rule of damages was prima facie the difference between the value of the power as it was and what its value would have been had its condition been as represented; that while defendant might show in mitigation of damages that plaintiff might have relieved himself of a part of the damages by paying a less sum under the decree, such showing could not defeat plaintiff's right of recovery, especially as plaintiff might have been compelled to compensate other owners for the injury to their land as well. *Peters* v. *Birkett*, 61.

2. Representations by the officers of a limited partnership association, to induce the purchase of stock, that there was a constantly increasing demand for the product of the association's factory, that it had a plant costing about $100,000, that the experimental stage had long since been passed and the basis of assured success well laid, and that the output of the factory was over 1,000 pounds of product per hour, which would show a profit of 35 per cent. on the investment, were not mere expressions of opinion, but were statements of fact, for which, being false, an action lies. *Martin* v. *Veana Food Co.*, 282.

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FRAUD—Continued.

3. Though one may, without legal liability for results, permit another, for a consideration, to share his hopes, however adroitly the statement of his hopes may be phrased, he may not by actual misstatement, without liability, induce the belief that the venture is without other risk than the usual risk of an established and prosperous business. *Id.*

4. In an action for fraud in inducing plaintiff to purchase shares in a limited partnership association as a part of the consideration for his appointment as district manager under a contract contemplating his sale of 800 cases of goods per month, evidence was admissible tending to show that it was impossible or unlikely that a manager could sell the amount specified. *Id.* 283.

5. In an action for fraud consisting of false representations inducing the purchase of corporate stock, a judgment for plaintiff is reversed because of a fatal variance between the declaration and proofs; Mr. Justice MCALVAY, with whom concurs Mr. Justice CARPENTER, writing for reversal on the ground that the representation as alleged was made by defendant directly to plaintiff, while that proved was a letter written by defendant to a third person and by him shown to plaintiff, and the statement in the letter did not correspond with the allegations; and Mr. Justice OSTRANDER, with whom concur Justices HOOKER and MOORE, writing for reversal on the ground that the representations were alleged to have been made to induce the purchase of stock in a concern in N., while those proved were to induce the purchase of stock in a concern to be removed to and operated in Y. *Fisher* v. *Radford*, 385.

6. A defrauded party does not owe to the party who defrauds him an obligation to use diligence to discover the fraud. *Lewis* v. *Jacobs*, 664.

See CANCELLATION OF INSTRUMENTS (4); STREET RAILROADS.

FRAUDS, STATUTE OF.

1. An oral agreement by an heir indebted to his ancestor not to claim a share of the realty of the estate cannot affect a vested interest in the land. *Broas* v. *Broas*, 310.

2. Where defendants stated to plaintiff "any beef you sell M. while he is working on our logs we will pay for," and plaintiff charged the beef upon his books to M., defendants' agreement was a "promise to answer for the debt of another person," which, under section 9515, 3 Comp. Laws, is required to be in writing. *Sherman* v. *Alberts*, 361.

3. An oral agreement for a right of way over land for a spur track is void under the statute of frauds. *Dummer* v. *United States Gypsum Co.*, 622.

FREEHOLDERS—See DRAINS (5, 6).

GAME.

The right to hunt wild fowl upon the navigable waters of the

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GAME—Continued.

State is a public right, of which any citizen may avail himself, subject to the game laws of the State, the exercise of which will be protected by the courts. *Ainsworth* v. *Munoskong Hunting & Fishing Club*, 186.

HABEAS CORPUS.

When there is a valid conviction and an irregular sentence, which, under the law, may be corrected by a new sentence, habeas corpus will not be permitted to perform the office of a writ of error. *In re Vitali*, 514.

HARMLESS ERROR.

In an action for damages for breach of a contract by which plaintiff was employed by defendant to cut the timber on certain lands, which defendant falsely represented belonged to him, the allowance of improper questions to defendant's superintendent, on cross-examination, as to statements made by him to the effect that defendant did not own the land, was not hurtful where it was otherwise conclusively proved by competent testimony that defendant did not own the land. *Mott* v. *Penoyar*, 274.

HAWKERS AND PEDDLERS.

1. The popular meaning of the words "hawker" and "peddler," and the meaning indicated by the derivation of the words, involves ideas both of the carrying of goods for sale and of an itinerant vender. *Allport* v. *Murphy*, 486.

2. The charter of Muskegon empowers the common council "to license hucksters, peddlers * * * in the business of hawking and peddling, and to regulate the sale by peddling (directly or by canvassing for subscription) of goods, wares, merchandise * * * by persons going about from place to place in the city for that purpose." (Act 469, Local Acts 1895, title 7, § 24, subd. 8.) An ordinance of the city provided: "Any person or persons who shall go about from house to house or place to place and sell or offer to sell any article of trade or commerce to be delivered then or in the future shall be deemed a hawker and peddler within the meaning of this ordinance." A warrant for the arrest of one charged with going about from place to place in the city taking orders for teas, coffees and baking powders, etc., from persons who were not dealers in these commodities, was refused upon the ground that such person was a citizen merchant who solicited orders and filled the same from goods kept in his store, and that such method of conducting his business did not make him a hawker and peddler under the general statutes, the charter or the ordinance. *Held*, that the common council did not attempt to prescribe by the ordinance a new definition for the legal terms "hawker" and "peddler," but the ordinance was only an exercise of its charter power, and, applying alike to all persons, was valid. *Id.*

HIGHWAYS AND STREETS.

1. In an action for damages resulting from an injury suffered in

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HIGHWAYS AND STREETS—Continued.

a collision between vehicles on a highway, an instruction that might be open to the criticism that it failed to put upon plaintiff the duty of maintaining any outlook to discover approaching vehicles is not inappropriate where it appears that plaintiff saw defendant coming when some distance away and the jury could not have misapprehended plaintiff's theory in that regard. *Buxton* v. *Ainsworth*, 316.

2. Where defendant was traveling at night in a track on the right-hand side of the wrought portion of the highway, and met plaintiff who was traveling in the same track, whether defendant exercised ordinary care in voluntarily turning his horse to the left to avoid a collision was at most a question for the jury, and an instruction stating that in such case there was not a want of ordinary care was properly refused. *Id.*

3. In an action by a landowner for injuries to his mill pond by the construction of an embankment therein to carry a highway across it, evidence was admitted showing the location of the culvert to be outside the original channel of the stream, and also showing the location of the mudsills, which the judge concluded was incompetent, no such claim being made in the declaration, and he instructed the jury not to consider it. *Held*, that no prejudice appeared. *Schneider* v. *Township of Brown*, 454.

4. Evidence of labor performed in removing logs, of the effect of water preserving the logs when sunk, of the construction of fences by plaintiff alongside the bridge and his reason therefor, of the soundness of some of the logs taken out of the pond and sawed into lumber, of the value of the logs in the pond, of the ordinarily necessary repairs to the mill, how the embankments were constructed, and other evidence of a similar nature, *held*, competent as bearing upon the various issues involved. *Id.*

See EMINENT DOMAIN (1); EVIDENCE (6).

HUSBAND AND WIFE—See DEEDS (1, 3, 4); TRUSTS (1).

ICE—See ANIMALS.

IMPLIED CONTRACT—See WORK AND LABOR (2, 3).

INDICTMENT AND INFORMATION—See CONSPIRACY (1); INTOXICATING LIQUORS (5).

INJUNCTION.

1. An injunction to restrain the obstruction of an area between the buildings of complainants and defendant will not be denied on the ground that complainants have delayed commencing suit until its issuance would cause defendant more damage than its refusal would cause complainants, where long before defendant's building was commenced defendant was notified that complainants insisted upon the area being left open, and tendered defendant the amount of money required by their deed and contract to entitle them to have it left open, which defendant refused. *Tolsma* v. *James E. Scripps Corporation*, 14.

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INJUNCTION—Continued.

2. An injunction to restrain the obstruction of an area between the buildings of complainants and defendant will not be denied on the ground that defendant is leaving open an area which will be much more advantageous to complainants' building than the one in controversy, complainants being entitled to decide that matter for themselves as long as they keep within their legal rights. *Id.*

3. The first question in an injunction case, in addition to the general question on the threshold of every chancery case relative to jurisdiction, is as to the necessity for the restraining writ of the court, and this is determined by ascertaining the nature of the injury done or threatened. *Ainsworth* v. *Munoskong Hunting & Fishing Club*, 185.

4. Where defendant by its agents and servants had repeatedly interfered with complainants' right to hunt wild fowl upon certain navigable waters, and threatened to continue so doing, complainants' remedy at law by a multiplicity of actions for trespass was inadequate, and the existence of such remedy was no objection to their right to an injunction. *Id.*

5. The right of citizens to hunt wild fowl on the navigable waters of the State is a civil right, protection in the exercise of which is within equitable jurisdiction. *Id.* 186.

6. Such right is not merely a bare legal right, interference with which causes no substantial injury, but is a right of sufficient dignity that interference therewith may be prevented by injunction. *Id.*

7. A bill filed by citizens of the State against a hunting club to enjoin interference by defendant with complainants' right to hunt wild fowl upon the navigable waters of an arm of the Great Lakes, which alleges that defendant, by its agents and game keepers, claimed the exclusive right to hunt in such waters, and unlawfully interfered with complainants' exercise of such right by rowing boats among complainants' decoys and preventing ducks from alighting near them, and advertises that it will continue to prevent all persons, including complainants, from hunting there, sufficiently states an apprehended and threatened injury to justify an injunction. *Id.*

8. The threatened injury to complainants was irreparable within the rule that an injury is irreparable when it cannot be adequately compensated in damages, or when there exists no certain pecuniary standard for the measurement of damages, due to the nature of the right or property injured. *Id.*

9. A bill to restrain the violation of a contract of employment which alleges that defendant is making use of the information gained through his employment with complainant to win away to a competitor complainant's customers, and that he is doing so by making fraudulent misrepresentations of fact, states a case as to which the remedy at law is inadequate. *Grand Union Tea Co.* v. *Lewitsky*, 244.

See DRAINS (3, 4).

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INSTRUCTIONS — See CRIMINAL LAW (1); DAMAGES (6); FALSE PRETENSES (1); HIGHWAYS AND STREETS (1); TRIAL.

INSURANCE.

1. A declaration by a foreign insurance company on a bond is not demurrable under section 10467, 3 Comp. Laws, for failure to aver a compliance with the statute (sections 5123, 5133, 2 Comp. Laws) prescribing conditions under which foreign insurance companies may be permitted to do business in this State. *Prussian National Ins. Co.* v. *Eisenhardt*, 198.

2. Where the laws of a fraternal beneficial society provide that no member can pretend to the benefits if he has neglected during three months to pay his monthly dues, and that every member who has neglected during one year to pay dues shall, after notice, be erased from the registry of the society, a member in arrears more than three months is not entitled to benefits, though not erased from the registry. *Houle* v. *Societe St. Jean Baptiste*, 357.

3. Where the members are entitled to participate in two different funds, viz., a widow and orphan fund, arising from assessments, and a funeral benefit fund, arising from monthly dues, a law providing that no member can pretend to benefits if he has neglected during three months to pay his monthly dues, applies to both funds, and a member so in arrears cannot participate in either fund. *Id.*

4. A conversation with the secretary of defendant society, relied upon as an excuse for the nonpayment of dues, is insufficient for that purpose where, giving it the utmost effect claimed for it, it only amounted to information that the dues were paid for a certain period, a fact which was true, and the nonpayment of subsequent dues caused the forfeiture. *Id.*

5. Where, in an action on a policy of insurance, the declaration counted on a policy which had lapsed, and, in response to a demand for a bill of particulars stating specifically the date and amount of the policy referred to in the declaration, the plaintiff filed a bill which mentioned a second policy as well as the first, this, in legal effect, was the same as if both policies had been declared upon, and no amendment was necessary to make the second policy admissible in evidence. *Hurd* v. *Northern Accident Co.*, 474.

6. Under the charter of a beneficial association and the laws of Connecticut, the State of its domicile, benefits were payable only to some member of the immediate family of the member at the time of his death. An unmarried man became a member and accepted a certificate payable to his mother, provided that she was at the time of his death his lawful beneficiary under the charter, constitution, and laws of the order, and the laws of Connecticut. At the time of his death the member had a wife and children and his mother was not a member of his family. *Held*, that on the face of the contract, the mother was not entitled to the benefit. *Knights of Columbus* v. *McInerney*, 574.

7. The fact that a sister of a member of a beneficial association

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INSURANCE—Continued.

had been allowed to pay the assessments for several years, with the understanding and expectation on her part and that of the member's wife that his mother, the designated beneficiary, was the lawful beneficiary, whereas the widow and children were the legal beneficiaries, amounts only to payment under a mistake of fact, and does not entitle the mother to the benefit. *Id.*

8. That the association had authority "for special" reasons to accept a designation out of order, did not require it to pay the fund to the member's mother, the designated beneficiary, where the member designated her at a time when he had no family of his own and made no further designation; since on his death the right to the fund vested in his heirs and the association was powerless to change those rights by any action it might take in favor of another. *Id.*

9. A provision in the charter of a mutual fire insurance company requiring the payment of assessments within 30 days after the "issuing" of the notice of assessment, means within 30 days after the giving or delivery of such notice. *Miner* v. *Farmers' Mut. Fire Ins. Co.*, 594.

10. Where the charter of a mutual fire insurance company provides the notice of assessment that shall be given to members, a member can only be put in default by the notice provided for, and his knowledge otherwise acquired is not sufficient. *Id.*

11. In an action on a policy issued by a mutual fire insurance company on which plaintiff had failed to pay an assessment, testimony tending to show that the notice of assessment required by defendant's charter had not been received was some evidence that the notice was not mailed, and raised an issue of fact which should have been submitted to the jury. *Id.*

See RELEASE.

INTOXICATING LIQUORS.

1. Under the authority granted by its charter (sections 184, 186) to license and regulate the sale of intoxicating liquors, the common council of the city of Detroit has authority to enact an ordinance establishing limits beyond which saloons shall not be allowed. *Churchill* v. *Common Council of City of Detroit*, 98.

2. A municipal ordinance to "restrain, license and regulate saloons," etc., which provides that "no person licensed under this ordinance shall harbor or employ any females in or about his or her place of business, or permit females to resort to his or her place of business for the purpose of drinking," is not invalid as an unwarranted discrimination against females and an infringement of their rights, privileges, and immunities, granted by the Constitution, but is a valid exercise of the police power. *People* v. *Case*, 98.

3. The charter of the city of Flint (Act No. 420, Local Acts 1905), by section 10 of chapter 15 of which, power is conferred upon the common council to prevent vice and immorality, and

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INTOXICATING LIQUORS—Continued.

to restrain, license and regulate saloons and other places where intoxicating liquors are sold, authorizes an ordinance prohibiting women from resorting to places where liquors are sold for the purpose of drinking. *Id.*

4. The law regulating the sale of intoxicating liquors in this State is constitutional. *People* v. *Kemmis*, 117.

5. On mandamus to compel the vacation of an order quashing an information for the violation of the liquor law, the writ is denied by a divided court; Mr. Justice CARPENTER, with whom concur Justices OSTRANDER, HOOKER, and MCALVAY, writing for a denial of the writ on the ground that the information which charges the accused with "being then and there a person whose business consists in part in the sale of drugs and medicines," etc., is fatally defective in that it fails to set up that accused had given the bond prescribed by section 5381, 2 Comp. Laws; Mr. Justice MONTGOMERY, with whom concur Chief Justice GRANT and Justices BLAIR and MOORE, writing for the issuance of the writ on the ground that the information charges all the essential ingredients of the offense as defined by the statute, and that if subsequent provisions of the statute introduce exceptions it is not necessary for the pleader to negative them. *Peters* v. *Eaton Circuit Judge*, 467.

6. Engaging in the business of selling a malt liquor containing about two per cent. of alcohol without having paid the tax constitutes a violation of sections 5379, 5380, 2 Comp. Laws. Per HOOKER, J., GRANT, C. J., and MONTGOMERY, J. *People* v. *North*, 612.

7. In an action against a city to recover back monthly payments of the license fee for keeping a saloon, on the theory that the payments were made involuntarily, under threats of arrest, evidence examined, and *held*, to show that the payments were voluntarily made, and that a verdict was properly directed for defendant. *Eslow* v. *City of Albion*, 720.

8. Evidence of the receipt, agreement, and protest made the year previous relative to the license fee of that year, afterwards returned, was properly excluded as immaterial on the question of whether the payments were voluntary. *Id.*

JOINT ACTION—See PRINCIPAL AND SURETY.

JUDGMENTS.

1. Where the declaration in an action on a judgment contains sufficient allegations as a declaration on a justice's judgment, it will support a judgment against a defendant who had full opportunity after personal service to present his objections in the usual way, though it also contains allegations showing invalid proceedings by which a transcript of the judgment was attempted to be filed in the circuit court, and the declaration purports to be upon the judgment as a circuit court judgment; since the fact that the declaration contains more than sufficient should not be permitted to defeat it. *Goebel Brewing Co.* v. *Medbury*, 49.

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JUDGMENTS—Continued.

2. Where in an action on a judgment defendant's default was entered without any order for the assessment of damages, and several months later the circuit judge heard the case on assessment of damages, and entered judgment accordingly, a subsequent order amending the default order nunc pro tunc so as to provide for an assessment of damages by the court was properly granted, no appearance having been entered or step of any kind taken by the defendant. *Id.*

3. A former adjudication of the matters put in issue by an original bill to set aside a chancery foreclosure sale does not appear where the former proceeding was by petition in the foreclosure suit which was dismissed because not the proper remedy. *Butters* v. *Butters*, 153.

4. On a bill to set aside a chancery foreclosure sale, filed by the divorced wife of the mortgagor, complainant's claims of homestead rights in one of the lots, and of a right to have the other first sold, do not commend themselves to the court, where such claims were not presented in the foreclosure suit, and complainant is claiming rights based upon a deed subsequently given her by her husband in settlement of their property rights. *Id.*

5. Under section 10272, subd. 12, 3 Comp. Laws, the use of the word "order" instead of "adjudged" in overruling a demurrer to a declaration is not reversible error. *Prussian National Ins. Co.* v. *Eisenhardt*, 198.

6. On the trial of a claim in behalf of a son, against the estate of his father, for services rendered on the father's farm, in reliance upon a promise that upon the death of the parents the farm should belong to the son, testimony tending to show that the father conveyed the farm to the son affords no basis for a verdict, where it has already been determined, in a suit between the heirs of the father and the heirs of the son, that no such conveyance was made. *In re Colburn's Estate*, 206.

7. A statute of Indiana making the affidavit of the petitioner in a divorce case prima facie evidence of his bona fide residence necessary to confer jurisdiction upon the courts of that State, merely prescribes a rule of evidence for the courts of Indiana, ineffective here, and does not prevent a showing here that the petitioner was in fact a resident of Michigan, and that the courts of Indiana had no jurisdiction. *O'Dell* v. *Goff*, 643.

See TAXATION (5).

JUDICIAL NOTICE—See EVIDENCE (1, 13).

JUDICIAL SALES.

1. A court of chancery has inherent power to set aside sales made by its order, whether the property is bid in by a party to the suit or by a stranger. *Butters* v. *Butters*, 153.

2. Chancery practice requires every sale to be reported to the court and an order confirming it. *Id.*

3. Where it is sought to vacate an order confirming a chancery

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JUDICIAL SALES—Continued.

sale and to obtain a resale of the property, the manner of bringing a grievance to the attention of the court is not of particular importance so long as new rights have not intervened and the original parties to the suit and the purchaser have notice and opportunity to be heard. *Id.*

4. Where, on a petition to open a chancery sale, an affidavit of the non-residence of the purchaser was made, an order for his appearance was made and published, and it appears that he had notice of the proceeding, no reason appears to deny the power of the court to determine the matter presented by the petition upon the merits, if complainant was within the jurisdiction of the court. *Id.*

See MORTGAGES (3–5).

JURISDICTION—See COURTS (2, 3); EXECUTORS AND ADMINISTRATORS (1); JUDGMENTS (7); JUDICIAL SALES (1); MARITIME LIENS; WILLS (1).

JURY.

1. A trial judge may, in the exercise of his discretion, excuse a juror for cause at any time before the introduction of evidence. *Quay* v. *Duluth, etc., R. Co.*, 567.

2. Error, if any, in excusing a juror after he had been sworn, is not prejudicial, where the cause was submitted to an impartial jury, since this court could not require the cause to be tried before the jury first sworn. *Id.*

See CRIMINAL LAW (12); TRIAL (15, 16).

JUSTICES OF THE PEACE—See CERTIORARI; COURTS (3).

LANDLORD AND TENANT.

1. Where a lease gave the landlord the right of re-entry in case of nonpayment of rent, and he also had a chattel mortgage on the stock and fixtures on the premises belonging to the tenant giving him the right on foreclosure to sell at private sale without notice, he was not liable to the tenant-mortgagor for damages for destroying and breaking up his business where, the tenant being in default on both instruments, he went peaceably into the store and suggested that the tenant "give up the ghost," and on the tenant's declining to do so without the advice of counsel, and leaving the store to obtain such advice, he locked the door and retained possession for the purpose of foreclosing. *Laetz* v. *Tierney*, 279.

2. A lease for life, properly signed and acknowledged by the lessor, containing covenants on the part of the lessee, is valid, though not signed by the lessee, he having taken and retained possession under it. *Bakker* v. *Fellows*, 428.

LAW OF THE CASE—See APPEAL AND ERROR (10).

LEASE—See LANDLORD AND TENANT (2).

LICENSE—See INTOXICATING LIQUORS (7).

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LIFE ESTATES—See DEEDS (1, 2); DRAINS (5); LANDLORD AND TENANT (2); MORTGAGES (1).

LIFE INSURANCE—See INSURANCE (2–8); RELEASE.

LIMITATION OF ACTIONS.

1. A surety is not protected against contribution by the failure of his co-surety to make payment until after the statute of limitations has run against their joint obligation, which obligation has been kept alive as against him by a valid judgment in favor of the obligee; since the right of action for contribution does not accrue until after payment has been made. *Kelly* v. *Sproul*, 691.

2. Sections 9734, 9742, 3 Comp. Laws, limiting the time within which actions may be brought in certain cases, have no application to an action for contribution between sureties. *Id.*

MANDAMUS.

1. On mandamus to compel a circuit judge to set aside an order denying a change of venue, matters contained in the petition and brief for relator that were not presented to the circuit judge, and were not within the grounds assigned in the motion, will not be considered. *Glazier* v. *Ingham Circuit Judge*, 481.

2. Where a mandamus case is heard on the petition and answer to the order to show cause, averments of the answer must be assumed to be true. *Allport* v. *Murphy*, 486.

3. Mandamus on the relation of private relators is not available to compel the police officers of Detroit to prohibit Sunday baseball playing in the city, where it does not appear that the grievance of relators is any other than that sustained by other citizens of the city, or that the attorney general has refused to act, since the grievance being purely a public one, redress should be sought by the people's public agents, and not by private intervention. *Sweet* v. *Smith*, 674.

See CRIMINAL LAW (9); INTOXICATING LIQUORS (5).

MARITIME LIENS.

Under sections 10789 and 10790, 3 Comp. Laws, providing for the enforcement of liens on water craft, the circuit court has jurisdiction of proceedings brought for that purpose, notwithstanding the amount of the claim is less than $100. *Detroit Lumber Co.* v. *Auxiliary Yacht "Petrel,"* 528.

MASTER AND SERVANT.

1. In an action by the employé of a telephone company for personal injuries, evidence examined, and *held*, that whether it was the duty of the company to have furnished plaintiff with a sufficient quantity of insulated wire, and whether it discharged that duty, were questions for the jury. *De Kallands* v. *Washtenaw Home Telephone Co.*, 25.

2. An employé may recover for the negligence of his employer, although the negligence of a fellow-servant contributed to the injury. *Id.*

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MASTER AND SERVANT—Continued.

3. In an action by the employé of a telephone company for personal injuries, *held*, under the evidence, to be a question for the jury whether the plaintiff's method of drawing two wires across certain other highly charged wires at once was more unsafe than to draw them one at a time. *Id.*

4. Where, in an action by the employé of a telephone company for personal injuries, there was evidence from which the jury might have found that the defendant was negligent in not furnishing plaintiff with a sufficient quantity of insulated wire, and plaintiff's injuries were caused by another employé allowing the wires they were stringing to sag and come in contact with a trolley wire over which they were crossing, it was not error to refuse to direct a verdict for defendant on the ground that the uninsulated wire was not the proximate cause of the injury. *Id.* 26.

5. The doctrine of assumed risk applies, and is limited in its application, to dangers which the employé either actually knows or should know. *Id.*

6. Actual ignorance of the dangers of the employment will not alone suffice to relieve an employé from his assumption of the risks of the employment; the ignorance must also be excusable. *Id.*

7. The doctrine of the assumption of obvious risks applies as well to those risks which arise or become known to the employé during the employment as to those in contemplation at the original hiring. *Id.*

8. The doctrine of the employé's assumption of the risks of his employment rests upon the contract of employment, which the law implies he accepts with all the risks incident to the employment, without regard to the magnitude of the danger. *Id.*

9. It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or, at least, to an ordinarily prudent servant, under the circumstances, that there is danger in such a situation. *Id.*

10. When there is a possible phase of a case where the risk was not assumed, the trial judge cannot properly direct a verdict on the ground that such risk was assumed. *Id.* 27.

11. In an action by an employé of a telephone company for personal injuries received while stringing a line of wire, caused by the wire coming in contact with a trolley wire, evidence examined, and *held*, that whether plaintiff actually had knowledge of what constituted a grounding of himself or of the telephone wires, and whether he was ignorant of the fact that he was not insulated while in his position on the pole, were questions of fact for the jury. *Id.*

12. A servant employed by a telephone company as lineman cannot avoid the effect of his assumption of the obvious risks of his employment by showing his ignorance of what constitutes

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MASTER AND SERVANT—Continued.

a grounding, and whether he was insulated while upon a pole in contact with telephone wires, since the danger from contact with highly charged wires was a characteristic risk of his employment, and it was implied in the contract of employment as lineman that he knew those things with reference to the creating of grounds and circuits which a telephone lineman must necessarily know in order to conduct his business with any degree of safety whatever to himself, his employer, or his co-employés. *Id.*

13. The rule that an employé does not assume the risk of dangers arising through the negligence of his employer does not apply to cases where the negligence and the resulting danger are discovered by and known to the employé before entering upon the performance of the work; to hold otherwise would be to apply to such cases the rule which is only applicable in cases where the risk grows out of the violation by the employer of statutory provisions for safeguarding employés. *Id.*

14. In an action by a servant against a beet sugar manufacturing company for injuries resulting from his being pinched between cars he was coupling, by reason of another car being pushed against them by other servants of defendant, evidence examined, and *held*, under the circumstances, a question for the jury whether defendant was not guilty of actionable wrong in failing to provide for some warning of the danger from the approaching car to be given to one occupying the position occupied by plaintiff. *Pecard* v. *Menominee River Sugar Co.*, 84.

15. A servant who had no knowledge of the failure of the master to make rules governing the conduct of employés in moving cars about its yard, or to provide any warning to workmen engaged at a point where the moving of cars without warning would be likely to occasion injury, but on the contrary was unfamiliar with the master's methods, and had no thought that an absence of any regulations on the subject would result in a car being pushed without warning against a car to which he was coupling another, did not assume the risk of injury from that source. *Id.*

16. In a business conducted by many employés performing work independently of each other, and in which the work of one becomes periodically dangerous to another, it is the duty of the master to provide reasonable precautions against such danger, and amongst these is promulgating rules and regulations for the giving of warning to the persons likely to be endangered when such dangerous acts are about to be performed. *Id.*

17. A servant ordered by his foreman to couple a standing car to one being moved against it was not negligent in taking his position between the cars for that purpose so as to defeat his recovery for an injury caused by another car being pushed without warning against the standing car from the opposite direction. *Id.*

18. Where the services of a servant are accepted by the master,

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MASTER AND SERVANT—Continued.

and action is brought to recover their value, the burden is not upon the servant of proving faithfulness, but the burden of proving the contrary is upon the master. *Williams* v. *Crane*, 89.

19. Evidence that a servant employed to conduct a farm sold some of the crops and applied the proceeds upon his own claim for services, it being inferable that both parties intended that course to be pursued, and that there were some items for which credit was not given until attention was called to them, do not justify the court in saying as a matter of law that the servant was lacking in fidelity. *Id.*

20. After entering upon performance of a contract under which plaintiff was to work defendant's farm for a share of the crops, the parties abandoned the contract and agreed that the relation between them should be that of master and servant, the term of service to begin at the time the tenancy began. Before the change in their contract relations plaintiff did some work for other people, for which he received pay, but no loss occurred to defendant in consequence of plaintiff's absence while working for others. In an action by plaintiff to recover the value of his services, *held*, that defendant could not have credit for the money earned by plaintiff, but that he could not be charged with plaintiff's time while earning it. *Id.*

21. Where defendant testified that plaintiff's compensation for running his farm was to depend upon the good results obtained, he could not complain that plaintiff introduced testimony to show the value of the crops produced under his management. *Id.*

22. A master may conduct his business in his own way, and, unless a servant wishes to assume the risks of such method as his master has adopted, he should refuse to enter upon the employment, or leave it upon discovering the method, and a servant, knowing the hazards of the employment as the business is conducted, cannot recover for injuries received, on the ground that there was a safer way of conducting the business, which, had it been adopted, would have prevented the accident. *Lynch* v. *Saginaw Valley Traction Co.*, 174.

23. An experienced lineman, in the employ of an electric railway company, who knew that it was the practice of the company to make no separate inspection of poles, but to rely upon such as the linemen should make when occasion required them to work upon them, and that all changes of and repairs upon poles were made by the crew, in which he participated, assumed the risk of injury resulting from the employer's method of inspection. *Id.*

24. In an action by an electric lineman against his employer, an electric railway company, for personal injuries, based upon alleged negligence on the part of the company in failing to provide proper inspection of its poles, evidence that it was the universal custom of such railway companies to omit other inspection than that made by their repair crews, such as the

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MASTER AND SERVANT—Continued.

crew with which plaintiff was working, was admissible on the question of assumption of risk. *Id.*

25. Whether a non-delegable duty rested upon the master to provide a method of warning its servants of the approach of an electric crane will not be decided in a case in which it appears that, notwithstanding the absence of formally promulgated rules, the servant in charge of the crane understood that he was to "use all care possible" and to keep watch and call out and warn anyone who might be in the way, and that the accident to plaintiff happened because the operator of the crane was talking with another employé and plaintiff's location in the path of the crane "slipped his mind." *Ferry* v. *American Suction Gas Producer Co.*, 266.

26. In an action by a servant for injuries resulting from being run down by an electric traveling crane, in charge of an alleged incompetent servant, evidence examined, and *held*, insufficient to raise the inference of the operator's incompetence, especially in view of the fact that the disaster resulted, not from the operator's unskillfulness, but from a lapse of memory not inconsistent with skill and competency. *Id.*

27. A master is not liable for injuries to a servant resulting from the negligence of his foreman or superintendent in performing a delegable duty. *Id.*

28. Act No. 113, Pub. Acts 1901, as amended by Act No. 171, Pub. Acts 1905, prohibiting the employment of children under 14, and prohibiting the employment of children under 16 where dangerous to life or limb, though it does not expressly give a right of action to persons injured by its violation, and provides no remedy for one so injured, raises a duty to and for the benefit of persons of the class liable to be injured by its violation, and a child injured while so employed may maintain an action for his damages, if not himself a partaker in the wrong, or otherwise precluded by the principles of the common law from his proper standing in court. *Syneszewski* v. *Schmidt*, 438.

29. The law of actionable negligence, as applied between master and servant, embraces the doctrine of the assumption of risks on the part of the servant and the doctrine of contributory negligence. *Id.*

30. Where a boy under 16, employed in violation of Act No. 113, Pub. Acts 1901, was injured while so employed, the causal connection between the violation of the statute and the injury complained of was sufficient to support a recovery. *Id.*

31. The risk of injury by the negligence of fellow-servants cannot be assumed by a child under 14 employed in violation of the statute. Act No. 113, Pub. Acts 1901, as amended. *Id.* 439.

32. Where defendant employed plaintiff, under 16, without obtaining the sworn statement of parent or guardian required by the statute, Act No. 113, Pub. Acts 1901, as amended, he was not relieved from liability for injury to plaintiff during the employment by the fact that plaintiff told him he was over 16 and he accepted the statement in good faith. *Id.*

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MASTER AND SERVANT—Continued.

33. In an action by a servant for personal injuries, the testimony of plaintiff and his witnesses, if credited by the jury, established the fact that the stamping machine which plaintiff was operating at the time of the injury repeated and was defective, causing the injury. Defendant offered testimony tending to prove that it was mechanically impossible for the machine to repeat, and had the machine in operation before the jury and before this court. *Held*, that whether the machine was defective and repeated was a question for the jury. *Clemens* v. *Gem Fibre Package Co.*, 495.

34. Objections to the testimony of a witness as to the condition of a machine at the time he repaired it some two months after an accident, on the ground that he first saw the machine at the time he repaired it, were properly overruled where defendant claimed that no repairs had been made subsequent to the accident which affected the operation of the machine, introduced testimony tending to prove that the parts of the mechanism complained of were quite hard and not likely to wear seriously in two or three months, and had the machine in court and operated it before the jury, manifestly on the theory that its then condition was not materially different from that at the time of the accident. *Id.*

35. Where, in an action by a servant for injuries received while operating a stamping machine, there is a conflict of testimony as to the character of the warnings and instructions given plaintiff at the time of setting him to work, and the instructions, if plaintiff's testimony is believed, were insufficient, the question is one of fact for the jury. *Id.* 496.

36. Where plaintiff, an inexperienced servant, without knowledge as to the proper method of operating the stamping machine at which he was set to work, and which was alleged to have been defective, was instructed to operate it in the most dangerous way, and was hurt within a few minutes after he commenced the work, the question whether, in view of his inexperience, he was likely to appreciate the danger of following the instructions, was a question of fact for the jury; and if they determined he was not, then, regardless of the condition of the machine, the giving of instructions by the person charged with the duty of giving them to do the work in a dangerous way, when there was a safe way, was actionable negligence. *Id.*

37. Where an inexperienced servant was set to operate a dangerous machine, his assumption of the ordinary risks thereof was dependent upon his being properly warned and instructed in its use. *Id.*

38. Where an inexperienced servant was set to work upon a dangerous machine which was in a defective condition, he assumed only such risks as the jury find he knew of or ought to have known of and appreciated their dangerous character. *Id.*

39. Whether an inexperienced servant was guilty of contributory negligence in operating a dangerous machine in the manner

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MASTER AND SERVANT—Continued.

in which he was instructed by the superintendent of the factory when set to work, is at most, from defendant's standpoint, a question for the jury. *Id.* 497.

40. That a master employing a boy under the age of 16 at a dangerous employment in violation of Act No. 113, Pub. Acts 1901, was deceived in respect to his age, to which deception the boy was a party, does not estop the boy from maintaining an action for damages resulting from a personal injury received in such employment. *Braasch* v. *Michigan Stove Co.*, 652.

MAXIMS—See EQUITY.

MECHANICS' LIENS.

Though sections 10721, 10730, and 10736, 3 Comp. Laws, confide the question of costs and solicitors' fees in mechanics' lien cases to the discretion of the court, the complainant in a bill to enforce a lien, on establishing his right to a decree, should be allowed his actual disbursements and a reasonable amount for his solicitor. *Wisniewski* v. *Nawrocki*, 523.

MONOPOLIES—See CONSTITUTIONAL LAW (4); STATUTES (3).

MORTGAGES.

1. Where, by connivance with the life tenant of certain land, her brother bought a mortgage thereon and foreclosed it and deeded the land to her for the purpose of cutting off the remainderman's title, he is entitled to redeem by paying the amount of the mortgage, less the value of an annuity equal to the annual interest charge payable by the life tenant during her expectancy of life as shown by the standard life tables. *Engel* v. *Ladewig*, 9.

2. Where a mortgagor conveys the mortgaged premises to a grantee who assumes the mortgage debt, the grantee becomes, as to the grantor, the principal debtor, and the grantor is his surety. *Pease* v. *Warner*, 140.

3. Whether Act No. 200, Pub. Acts 1899, requires lands sold under the usual decrees made by courts of chancery to be sold in parcels, will not be determined in a case in which it appears that though two lots were sold as one parcel, and that there were two houses and a barn thereon, one of the houses stood upon both lots, and a portion of one of the lots had been otherwise used with the other lot. *Butters* v. *Butters*, 154.

4. A chancery foreclosure sale will not be set aside because the commissioner's deed was not filed in the office of the register of deeds within 20 days, as required by Act No. 200, Pub. Acts 1899, since the files and records in the office of the register in chancery furnish the most complete information upon the subject. *Id.*

5. On a bill by a divorced wife to set aside a chancery foreclosure sale of lands upon which she had joined with her husband in giving a mortgage, evidence examined, and *held*, not to show such collusion between the husband and his brother, who

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MORTGAGES—Continued.

purchased at the sale, as would justify setting aside the sale and allowing the complainant to redeem. *Id.*

6. A mortgagee is entitled to pay taxes and to have an additional lien upon the land therefor, though the mortgage is silent as to the payment of taxes. *G. F. Sanborn Co.* v. *Alston*, 457.

7. Where, in a chancery foreclosure, the commissoner's report of sale and deed by reason of a clerical error fails to correctly describe the property, the description being correct in all proceedings prior to the report, the court has authority, upon due petition and notice, to vacate the order nisi confirming the report, and to correct the subsequent proceedings. *Walsh* v. *Colby*, 602.

8. Where a decree for foreclosure of a mortgage upon several adjoining lots was drawn in conformity with the statute (section 528, 1 Comp. Laws), it will be presumed that the commissioner making the sale under the decree followed its mandate, and there being no showing on exceptions to the report of sale that this was not done, or that the property could be sold in parcels without injury to the interests of the parties, objections to the confirmation of the report on the ground that the property should have been sold in parcels are untenable. *Id.*

9. Where a commissioner's deed, executed in chancery foreclosure proceedings, was duly filed with the register of deeds within the time provided by law, an objection to the execution of a new deed, correcting a clerical error in the previous one, apparent on the face of the record, on the ground that it cannot be filed within 20 days after the sale as provided by law, is not well taken, the sale not being disturbed, the time for redemption not being lengthened or shortened, and defendant making no showing of injury. *Id.*

See COVENANTS (3); EXECUTORS AND ADMINISTRATORS (2); FALSE PRETENSES (1).

MUNICIPAL CORPORATIONS.

1. Under section 2990, 1 Comp. Laws, the mayor of a city of the fourth class is charged with the duty of determining whether an applicant for the office of city attorney possesses the necessary qualifications, and no law authorizes a court to review his determination that an applicant is not qualified, notwithstanding the applicant claims a preferment under section 1, Act No. 329, Pub. Acts 1907, by virtue of being an honorably discharged Union soldier, having served in the late Rebellion. *Patterson* v. *Boron*, 313.

2. Under section 241 of the charter of Detroit (Compilation of 1904), requiring all contracts involving an expenditure of more than $200 to be let to the lowest responsible bidder, the common council has, in the absence of express delegation of power by the legislature, no authority to limit by ordinance the hours of labor of employés of city contractors or subcontractors where the effect is to increase the bids for city contract work. *Attorney General, ex rel. Hudson*, v. *City of Detroit*, 525.

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MUNICIPAL CORPORATIONS—Continued.

8. Under section 4, Act No. 417, Local Acts 1901, amendatory of the charter of Detroit, providing the procedure for removal of the commissioner of parks and boulevards, the commissioner can be removed only upon a showing of legal cause, the legal sufficiency of which cause is a question for the court. *Bolger* v. *Detroit Common Council*, 540.

4. Charges of gross neglect of duty by the commissioner, consisting of failure to protect the city in contracts let by him and to inspect or provide for proper inspection of public work being done under his direction, examined, and *held*, legally sufficient, if sustained by the proof, to authorize his removal. *Id.*

5. Gross neglect of duty, justifying the removal of a public officer, is not limited to intentional official wrongdoing, but extends to any neglect of official duty which permits the public interests to be injured or endangered, and which, from the gravity of the case, or the frequency of instances, becomes so serious in its character as to endanger or threaten the public welfare. *Id.*

6. The commissioner, having authority to "employ and at his pleasure discharge superintendents, engineers," etc., though entitled to rely to some extent upon their reports, could not rely upon them wholly, nor to the extent that he might if they were appointed by others and not entirely subject to his own discretion; and in proceedings for his removal it was a question for the council whether it was not gross negligence for him to rely upon his subordinates to the extent which the evidence indicated he did. *Id.*

7. Evidence in proceedings to remove the commissioner for gross neglect of duty examined, and *held*, to support the finding of guilty, especially as the six judges of the Wayne circuit court unanimously came to the same conclusion. *Id.* 541.

8. The proceedings being based upon charges of gross neglect of duty in respect to public improvements being done under the commissioner's direction, it was competent for the council to examine the work in order to have a better understanding of the testimony, especially where such examination was made in the presence of counsel for the commissioner and without objection from him. *Id.*

9. The action of the council in removing the commissioner, upon charges of gross neglect of duty, was properly sustained upon certiorari, against the objection that the council should have voted separately upon each charge and specification thereunder, and upon the question of removal, since the writ, being largely discretionary, is not granted in such cases upon purely technical grounds, and it is presumable that each alderman who voted for the affirmative upon the resolution of removal passed upon every one of the charges and specifications enumerated therein, and upon the question of removal. *Id.*

10. The facts that the city was fully protected against financial loss by bonds; that the work had not been finally accepted

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MUNICIPAL CORPORATIONS—Continued.

by the commissioner; that the contractors were bound to make good all defects in work or materials; and that the commissioner, according to his testimony, intended to make an accurate final inspection of the completed work and to require it to conform in all respects to the contract, were not so inconsistent with the charges of gross negligence as to invalidate the findings of the council, since it was the duty of the commissioner to inspect the work as it proceeded, and the bonds and the provisions of the contract did not dispense with the necessity for careful supervision, but furnished an additional remedy in case, with proper inspection during its progress, the improvement was found in any respect imperfect. *Id.*

11. If, acting upon competent evidence, the council were satisfied that the commissioner's performance of his duties evidenced such gross negligence as to indicate that his further continuance in office would be a menace to the public, his removal would not be improper for the reason that, in the end, the city would suffer no financial loss. *Id.*

12. Because the contractors had given bonds for the protection of the public against any money loss, it does not necessarily follow that no loss would have been suffered, since the inconvenience of the public during the period when necessary repairs or rebuilding would have to be done, a period in which, had the contract been performed according to its tenor, the public would have been entitled to the free and unobstructed use of the improvement, is an element of loss quite as important and worthy of consideration as a mere financial loss. *Id.* 542.

13. Where the common council of a village, organized under the general law, obtained from engineers estimates of the expense of installing and maintaining a waterworks system and improving the electric lighting plant belonging to the village, and, without official action upon the acceptance or adoption of the estimate, adopted a resolution calling a special election and submitting to the electors the question of borrowing a sum of money substantially less than the estimate furnished by the engineers, there was not a substantial compliance with section 2893, 1 Comp. Laws, and the action of the council and the election which followed were void. *Richardi* v. *Village of Bellaire*, 560.

14. A submission to the electors of a village, organized under the general law, of a proposition to borrow a certain sum of money for the "construction and maintenance of waterworks," there being nothing to show what proportion was to be used for construction and how much for maintenance, was void, since the statute (sections 2890–2900, 1 Comp. Laws) does not authorize the borrowing of money for the maintenance of waterworks. *Id.*

15. Where such proceedings to open a street were taken under chapter 90, 1 Comp. Laws, as resulted in a determination of the necessity of the improvement by one jury, and an assessment of the value of the property and of the benefits by an-

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MUNICIPAL CORPORATIONS—Continued.

other, and the award of the second jury was accepted by the owners of the property and paid by the city, there was a waiver by the only parties directly interested of the irregularity of submitting the questions to two juries, and persons whose only relation to the proceedings was their liability for benefits could not enjoin the collection of the special assessments because of the irregularity complained of. *Bousneur* v. *City of Detroit*, 585.

16. That the award was not accepted by the landowners, nor the money paid by the city, until after the bill was filed in this case, did not affect the right of the parties to waive the irregularities, nor to show such acceptance as evidence of waiver, since if the parties had a right to waive the irregularities, complainants could not deprive them of it by filing a bill. *Id.* 586.

17. Whether property within a special assessment district belonging to a church, and omitted from the assessment on the theory that it was exempt, should have been included, cannot be decided on a bill to enjoin the collection of the special assessment, since if the property should have been included the only relief available to complainants would be a reduction of their assessments, and to entitle them to that they should tender their proportionate share of the taxes and point out the extent of their reduction. *Id.*

See ESTOPPEL (2); HAWKERS AND PEDDLERS (2); INTOXICATING LIQUORS (1–3).

MUSKEGON CHARTER—See HAWKERS AND PEDDLERS (2).

NAVIGABLE WATERS — See FISH; GAME; INJUNCTION (4–6).

NEGLIGENCE.

1. In an action against the manufacturer of a threshing machine for injuries to a laborer using the machine in the usual course of business, caused by a concealed defect in the structure of the machine, instructions examined, and *held*, sufficiently favorable to defendant. *Pierce* v. *C. H. Bidwell Thresher Co.*, 823.

2. Where it was expected that the decking of a threshing machine over the cylinder would be used as a platform upon which operatives would have occasion to go frequently while the machine was in operation, and it was known that the consequence of breaking through would be most serious, the question whether it was imminently dangerous to human life or limb to place such machine on the market with a portion of the boards of the decking supported at one end only by four-penny nails driven upward through boards seven-eighths of an inch thick into maple cleats, not clinched or otherwise fastened, was at least one for the jury, though there was no expert testimony offered as to the dangerous character of the construction. *Id.*

3. The manufacturer having knowledge of the manner of con-

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NEGLIGENCE—Continued.

struction and of the uses to which the machine was to be put, the question whether he had a full appreciation of the danger was at least a question for the jury. *Id.*

4. Where, in a personal injury case, there is no testimony offered to show the earning capacity of the plaintiff, nor how much it has been diminished by the injury, it is error to instruct the jury that in awarding damages they may consider to what extent the injury has actually damaged plaintiff in his daily avocation and pursuit of life, and to refuse instructions of a contrary tenor. *Id.*

5. Though disobedience of a statute may be conclusive evidence of negligence, a condition of recovery by one urging the disobedience is that such disobedience must be the proximate cause of the injury complained of, or that it contributed to the injury. *Syneszewski* v. *Schmidt*, 488.

See ANIMALS; HIGHWAYS AND STREETS (2); MASTER AND SERVANT (14–17, 28, 29, 36, 39); RAILROADS (3, 4).

NEW TRIAL.

1. A verdict which is supported by the testimony of one witness is not necessarily a compromise verdict, though for less than the plaintiff claims, and the court instructed that if the jury disbelieved the plaintiff's testimony they should find for the defendant. *Alexander* v. *Mud Lake Lumber Co.*, 70.

2. It was not error to deny a new trial urged upon the grounds (*a*) that plaintiff's counsel, without objection at the time, illustrated his argument with a child's shoe of the size of one in which defendant claimed an important paper had fallen from a shelf and for a time become lost; (*b*) that a juror walked on the way to court with said counsel; (*c*) that counsel was intemperate in argument, the impropriety amounting only to a breach of good taste, and not of law. *Township of Alpena* v. *Mainville*, 733.

See APPEAL AND ERROR (2, 7); SAVING QUESTIONS FOR REVIEW (4–6).

NOTICE—See TAXATION (3, 4, 6, 7, 9).

OFFICERS — See CORPORATIONS (1, 2); MUNICIPAL CORPORATIONS (1, 8–12).

OPINIONS—See EVIDENCE (2).

ORDINANCES—See HAWKERS AND PEDDLERS (2).

OUSTER—See EJECTMENT (5).

PARENT AND CHILD—See WORK AND LABOR (1–3,

PARTNERSHIP—See SALES (2).

PAYMENT.

The question as to whether payments were voluntarily made, where the facts are undisputed, is one of law. *Eslow* v. *City of Albion*, 720.

See INTOXICATING LIQUORS (7, 8).

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PERSONAL INJURIES — See DAMAGES (1-6, 8, 9); EVIDENCE (8); MASTER AND SERVANT (1, 14-17, 22-36, 40); NEGLIGENCE (1); RAILROADS (1, 2).

PLEADING.

1. A declaration on the common counts in assumpsit, counting specially for the use of water used by defendant on plaintiff's premises and metered through plaintiff's meter, will not support a recovery on the theory that the entry upon plaintiff's premises by defendant constituted a trespass for which, under section 11207, 3 Comp. Laws, plaintiff was entitled to recover in assumpsit, the statute not being referred to and counted upon, nor the fact of the trespass alleged, in the declaration. *Weidman* v. *Willson*, 82.

2. Where the statement of the amount in the ad damnum clause of a declaration was inadvertently left blank, an amendment supplying the defect, asked and allowed before the jury was selected, was proper. Section 10268, 3 Comp. Laws. *Groat* v. *Detroit United Railway*, 165.

3. A declaration describing plaintiff as the "Prussian National Insurance Company" is not obnoxious to demurrer on the ground that there is no averment that plaintiff is a corporation. *Prussian National Ins. Co.* v. *Eisenhardt*, 198.

4. Where a declaration states that recovery is sought under section 11206, 3 Comp. Laws, relative to treble damages for trespass on lands, and it is conceded that the case made in the declaration is not within the section, no prejudice arises from allowing the plaintiff to amend at the conclusion of the trial by striking out the allusion to the statute, such amendment being clearly authorized by section 10268, 3 Comp. Laws. *McIntyre* v. *Murphy*, 342.

5. Where a declaration on the common money counts was accompanied by a bill of particulars disclosing an intention to recover money due for land sold on a contract assigned to plaintiff, there was no error in allowing plaintiff leave to amend the declaration at the close of his case so as to set forth the case described in the bill, including an allegation that the contract had been assigned to plaintiff. *Howland* v. *Caille*, 349.

6. A declaration in trover for the conversion of logs seized by defendant on a chattel mortgage and wrongfully removed from the place where seized, setting out certain negligent acts in transporting and caring for them, may be amended by adding a count claiming damages for the negligent acts described in the original declaration. *Croze* v. *St. Mary's Canal Mineral Land Co.*, 363.

See EJECTMENT (2); EMINENT DOMAIN (4); FRAUD (5); INSURANCE (1, 5); JUDGMENTS (1, 5); PRINCIPAL AND SURETY; SALES (5); SEDUCTION.

PRACTICE—See JUDICIAL SALES (3, 4).

PRESCRIPTION—See EASEMENTS (1, 2, 4); EJECTMENT (3).

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PRINCIPAL AND SURETY.

1. A declaration in an action on a bond against two persons jointly which avers that defendants acknowledged themselves bound to plaintiff by their writing obligatory shown to the court, the condition of which was that one of the defendants, named, as agent for plaintiff should promptly pay over all moneys received by him as such agent, etc., and that he thereafter became indebted to plaintiff as such agent and refused to pay over the moneys, etc., sufficiently alleges a "joint condition in the bond and a joint breach of it." *Prussian National Ins. Co.* v. *Eisenhardt*, 198.

2. The declaration showing a joint obligation, and that one of defendants was plaintiff's agent, and that the bond was given to secure faithful performance of his duties as such, it sufficiently appears that the agent was the principal and the other defendant the surety in the bond. *Id.*

See LIMITATION OF ACTIONS; MORTGAGES (2).

PROCESS.

An amendment of the summons in a personal injury case as to the damages claimed, to make it conform to the ad damnum in the declaration, is allowable in the discretion of the court (§ 10268, 3 Comp. Laws), no surprise being claimed, or continuance and terms demanded. *Groat* v. *Detroit United Railway*, 165.

PROMOTERS—See CORPORATIONS (3).

PUBLIC IMPROVEMENTS—See MUNICIPAL CORPORATIONS (13).

QUIETING TITLE—See EXECUTION.

RAILROADS.

1. The presumption that one killed at a railway crossing, in the absence of testimony as to his conduct, did not fail to take proper precautions before attempting to cross the track, cannot be indulged to support a verdict against the railroad company in a case where it appears that shortly before reaching the crossing deceased stopped his team and took a position on the side of his load from which a train, according to the schedule, might be expected, but on the opposite side from that which the train in fact came, and went from thence to the crossing without stopping. *Schwartz* v. *Mineral Range R. Co.*, 40.

2. Where trains from the east and from the west were due to pass a crossing at shortly before 1:35 and shortly after 1:55, p. m., respectively, the fact that it was after 1:55 when deceased approached the crossing did not justify him, considering the season of the year and the locality, in withdrawing his attention entirely from the east. *Id.*

3. In an action against a railroad company for a wrongful death resulting from deceased's vehicle catching in a vacant space between the planking and defendant's track at a crossing, evidence of prior accidents of a similar nature is admissible

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RAILROADS—Continued.

to show negligence on the part of defendant in maintaining its crossing in that manner. *Woodworth* v. *Detroit United Railway*, 108.

4. Whether defendant railroad company's engine was properly equipped and managed so as to constitute a defense under the statute (section 6295, 2 Comp. Laws) to an action for negligent fire, *held*, under the evidence, to be a question for the jury. *Quay* v. *Duluth, etc., R. Co.*, 567.

See DAMAGES (7); EMINENT DOMAIN (1-4); STATUTES (4)

RAPE.

In a civil action for rape, plaintiff's reputation for chastity was not material as bearing upon the probability of her testimony, and proof that her reputation was bad having been admitted in mitigation of damages, the jury were properly instructed that they could consider it for no other purpose. *Harris* v. *Neal*, 57.

See SEDUCTION.

REFORMATION OF INSTRUMENTS.

Complainant, a vendor of lands, having accepted a reconveyance by quitclaim deed on defendant purchaser's failure to pay the price, filed his bill to reform the deed for a mistake in the description, and defendant answered, claiming to have acquired certain outstanding tax titles which he ought to be allowed to retain, and alleging his ignorance of the legal effect of the quitclaim as to those titles. Though the written contract of sale imposed no such obligation, the sale and the price were based upon an oral understanding that defendant was to acquire the tax titles. *Held*, that though defendant was not legally bound to purchase the titles for the security of his vendor, it was equitable for him to carry out his oral promise, and having attempted to do so, and accepted a release from his contract on executing the deed, equity did not demand that he be allowed to disregard the settlement. *Fleming* v. *Wheeler*, 331.

RELEASE.

That the widow of a member of a beneficial association, without consideration, supposing that her husband's mother, the designated beneficiary, was a legal beneficiary, at the solicitation of the secretary of the association, whose officers hesitated to pay the mother, executed to the association a release of any claim to the benefit, could not affect the right of the widow and her children to the fund, where the association, which interpleaded the parties, did not act upon the release, made no claim under it, and retained the fund in its hands for payment to those lawfully entitled to it. *Knights of Columbus* v. *McInerney*, 575.

REPLEVIN.

In an action of replevin for a span of horses in the possession of B., claimed by plaintiff to have been lent to A. with an

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REPLEVIN—Continued.

agreement for their return and subsequent sale to him, evidence examined, and *held*, to present an issue of fact for the jury, since if B.'s version was true he bought the horses of plaintiff on an agreement made by A., acting as his agent, and was not only entitled to their possession under the contract of sale, but, the horses having come lawfully into his possession, he was entitled to a demand before having them taken from him on the writ. *Anderson* v. *Pendl*, 693.

RES JUDICATA—See JUDGMENTS (6).

RESTRAINT OF TRADE—See CONSTITUTIONAL LAW (4); CONTRACTS (1).

RIPARIAN RIGHTS—See WATERS AND WATERCOURSES.

SALES.

1. A contract to furnish certain ice chopping machines on consignment, and an addition thereto providing for the sale of certain other machines of similar use, examined, and *held*, that the addition to the contract stated its own terms of payment and did not adopt the provisions of the original contract. *G. S. Blakeslee & Co.* v. *Reinhold Manfg. Co.*, 230.

2. In an action against a surviving partner for goods and supplies sold and delivered to a lumber company alleged to have been operated by the firm, evidence examined, and *held*, that whether the firm in fact owned and operated the company's business, so as to render the surviving partner liable, was for the jury. *Wolfe* v. *Stack*, 445.

3. Though the delivery of goods by a vendor to a common carrier is, in law, a delivery to the vendee, the vendor retains the right of stoppage in transitu. *People* v. *Andre*, 531.

4. For a breach of warranty of title to personal property, recovery may be had either in case or assumpsit, case being preferable where the breach has occasioned damages in addition to loss of the property. *Arnold* v. *White*, 607.

5. Where the declaration, in an action on the case for false warranty of title to personal property sold, claimed damages actual and consequential, the allowance of an amendment counting on an oral agreement made some time after the sale, by which defendant agreed to make good to plaintiff any loss he might sustain by allowing a mortgagee to take the property, was improper, as introducing into an action sounding in tort a cause of action upon which recovery could be had only in assumpsit. *Id.*

See ASSUMPSIT (2).

SAVING QUESTIONS FOR REVIEW.

1. Whether the court erred in permitting a view, and in subsequently permitting plaintiff to prove alterations in the premises since the accident, will not be considered where no objection or exception was taken to the rulings. *Woodworth* v. *Detroit United Railway*, 108.

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SAVING QUESTIONS FOR REVIEW—Continued.

2. Whether it was error, under section 10215, 3 Comp. Laws, to receive the testimony of a boy over 10 years of age, without his being sworn, will not be decided, where the objection was not made in the trial court. *People* v. *Kemmis*, 117.

3. Error in admitting on rebuttal evidence that would have been competent in chief cannot be availed of where not objected to below. *Id.*

4. Error in overruling a motion for a new trial on the ground of excessive verdict cannot be considered where no reasons were given by the trial court for its ruling and none were requested. *Groat* v. *Detroit United Railway*, 166.

5. Error in overruling a motion for a new trial cannot be considered where no reasons were given for the ruling and no exceptions were taken. *G. S. Blakeslee & Co.* v. *Reinhold Manfg. Co.*, 230.

6. Where there is evidence to support the verdict rendered, the question of excessiveness cannot be considered, in the absence of a motion for a new trial raising the question. *Westcott* v. *Wade*, 340.

7. Where defendant's theory below was that the declaration upon the common money counts would not authorize a recovery of money due for land sold, and that plaintiff was not entitled to recover because no assignment of the land contract to him was pleaded, and that the declaration was not amendable in these respects, a contention in this court, not presented to the court below, that plaintiff's assignor was a mere trustee, and his assignment a nullity, will not be considered. *Howland* v. *Caille*, 349.

8. Objections to the admission of the testimony of a physician, on the ground of privilege, not raised on the trial, will not be considered on appeal. *Clark* v. *Ulrich*, 695.

SCHOOLS AND SCHOOL DISTRICTS—See TOWNSHIPS (1).

SEDUCTION.

In an action for seduction brought under section 10418, 3 Comp. Laws, by the injured female, by her next friend, the declaration and proofs making a case of rape, a judgment for plaintiff is affirmed; Mr. Justice MONTGOMERY, with whom concur the Chief Justice and Mr. Justice BLAIR, writing for affirmance on the ground that though the reference to the statute cannot be treated as surplusage, the action may be maintained notwithstanding the intercourse was had by force and against the will of the plaintiff; and Mr. Justice CARPENTER, with whom concurs Mr. Justice MCALVAY, writing for affirmance on the ground that, though plaintiff had no right to bring suit for rape under the statute, the reference to the statute may be treated as surplusage, and the declaration sustained as a common-law declaration for assault. *Velthouse* v. *Alderink*, 217.

SOLDIERS—See MUNICIPAL CORPORATIONS (1).

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STARE DECISIS—See COURTS (1, 4, 5).

STATE LEGISLATURE—See TOWNSHIPS (2).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTES.

1. In the construction of a statute the manifest intent of the legislature must prevail over the literal sense of the terms used. *Township of Stambaugh* v. *Iron County Treasurer*, 104.

2. The title of Act No. 578, Local Acts 1905, providing for the detaching of certain territory from one township and attaching it to another, disclosing that intention, is broad enough to include a provision for the distribution of uncollected taxes in the detached territory. *Id.* 105.

3. Act No. 329, Pub. Acts 1905, invalidating contracts in restraint of trade, is an independent act with a title of its own, and is not limited in its operation by its section 7 to such contracts as are within the purview of Act No. 255, Pub. Acts 1899, for the prevention of trusts, monopolies, and combinations, though said section 7 declares Act No. 329 to be supplementary to, declaratory of, and in addition to, said Act No. 255. *Grand Union Tea Co.* v. *Lewitsky*, 244.

4. Act No. 238, Pub. Acts 1901, the title of which discloses an intent to amend the general railroad law, offends section 20 of article 4 of the Constitution, requiring unity of object and title, inasmuch as it attempts to graft upon the general railroad law a section under which corporations organized under it could enjoy all the rights and benefits of street railways, and acquire franchises in the public highways without limit as to time or control by local authorities. *Township of Ecorse* v. *Jackson, etc., Ry.*, 393.

See CONSTITUTIONAL LAW (5); CORPORATIONS (7, 8); ESTOPPEL (2); INTOXICATING LIQUORS (4); MASTER AND SERVANT (40); TAXATION (3).

STREET RAILROADS.

Where a street railroad, proceeding under Act No. 238, Pub. Acts 1901, obtained the consent of more than the necessary two-thirds of the abutting property owners without fraud, the fact that the consent of two others was obtained by fraud was not controlling. *Township of Ecorse* v. *Jackson, etc., Ry.*, 393.

See APPEAL AND ERROR (2); EMINENT DOMAIN (1); STATUTES (4).

SUNDAY—See MANDAMUS (3).

TAXATION.

1. Where a description of land is sold for the taxes of several years, the notice given by the tax-title purchaser, under section 140 of the tax law, must show the amount paid for that description, separate from all others, for the entire time covered by the notice. *Haden* v. *Closser*, 182.

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TAXATION—Continued.

2. On a petition for a writ of assistance by a purchaser from the State under a tax sale, testimony respecting a verbal offer by petitioner to sell the lands to respondent for what they had cost him examined, and *held*, that the offer was not to be left open indefinitely, and that the most that could be said was that respondent might have understood the offer to be open for a reasonable time. *McFarlane* v. *Simpson*, 193.

3. Act No. 229, Pub. Acts 1897, providing for a notice of tax purchase to be served on the owner of the lands sold, has no application to sales made by the auditor general prior to the date of the act taking effect. *Id.*

4. Where one who purchased under a tax sale, before Act No. 229, Pub. Acts 1897, took effect, served upon the owner of the land the notice required by that act, such notice could not be regarded as a continuing offer to sell, but the most favorable view that can be taken for the owner is that it would not have lain with the purchaser to refuse to accept redemption on the terms stated in the notice, had a tender been made within the time stated; whence a deposit with the county clerk, after the period of redemption stated in the notice had expired, was ineffectual. *Id.*

5. Where a landowner knew for nearly seven years that petitioner had bought his land from the State and held a tax deed therefor and claimed title to it, but made no effort to open the decree until the purchaser petitioned for a writ of assistance, though petitioner for two years had been insisting upon payment in full, there is such laches as will preclude an attack upon the decree upon the ground that the auditor general included in his petition lands which had been previously sold and bid in to the State. *Id.*

6. A notice of the sale of land for taxes which is insufficient for the reason that no State or county is named in the description in the body thereof is not aided by printed and written indorsements on the back thereof showing the State and county. *Curry* v. *Larke*, 348.

7. A notice of the sale of land for taxes, served on the record owner pursuant to section 140 of the tax law (Act No. 229, Pub. Acts 1897), is not relieved of its invalidity for failing to state the county and State in which the lands are situated, and whether the township and range mentioned are north or south, east or west, by the facts that no town and range of the same numbers exists in any other State or Territory, and only one such in the State of Michigan, since the record owner is not required to search the records of the surveyor general's office in Washington, or the records of other States, to determine whether there is any other like description. *G. F. Sanborn Co.* v. *Alston*, 456.

8. The fact that a landowner has for 15 years given his lands no attention and permitted the State to collect its taxes as best it might is not such laches as will estop him from insisting upon a substantial compliance by a tax purchaser with the provisions of section 140 of the tax law with respect to the notice of purchase. *Id.*

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TAXATION—Continued.

9. Act No. 229, Pub. Acts 1897, as amended, requiring tax purchasers to give the record owners the notice therein prescribed, and allowing the owners six months after notice to obtain a reconveyance upon compliance with the specified conditions, applies as well to lands which before the passage of the act had been bid in to the State, and to which the State, as the law then stood, had an indefeasible title, as to lands subsequently bid in. *Id.*

10. Where, by reason of a technical defect in the notice to redeem, the record owner is still entitled to a reconveyance from the tax purchaser, notwithstanding the expiration of the statutory period, equity will not lend him its aid to enforce his right unless he reimburses the tax purchaser for the amount paid by him for taxes assessed upon the land subsequent to his tax purchase. *Id.*

11. Where one pays taxes in good faith, claiming title but having none, he is entitled to reimbursement out of the land. *Id.* 457.

See MORTGAGES (6); MUNICIPAL CORPORATIONS (17); TOWNSHIPS (1, 3).

TORTS—See NEGLIGENCE (1); PLEADING (1).

TOWNSHIPS.

1. By Acts Nos. 577, 578, and 667, Local Acts 1905, by which certain territory was detached from the township of Iron River, in Iron county, and attached to the township of Stambaugh, the township of Atkinson disorganized and its territory attached to the township of Iron River, and the territory detached from Iron River detached from the school district known as the "Public Schools of Iron River" and attached to the "Public Schools of Stambaugh," the legislature intended to change the territorial boundaries of the townships of Iron River and Stambaugh and of the school districts in and coextensive with each, and to provide for the distribution of all uncollected taxes of all territory affected by the legislation; and the provisions in said Acts Nos. 577 and 578 empowering the treasurers of the townships of Iron River and Stambaugh to collect taxes due and unpaid, and to enforce the payment of delinquent taxes, and credit them to their respective townships, entitles said treasurers to receive from the county treasurer the delinquent taxes levied for township and school purposes upon property in said territory afterward collected by the auditor general and paid over to the county treasurer. *Township of Stambaugh* v. *Iron County Treasurer*, 104.

2. The legislature has authority to empower the township treasurer to receive all moneys belonging to the township treasury, and to take the necessary steps to obtain them. *Id.*

3. A township does not acquire a vested right in delinquent taxes levied for township purposes in its territory and returned unpaid so that the legislature cannot, upon detaching a portion of its territory, transfer the right of collecting

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TOWNSHIPS—Continued.

such taxes to the township to which the territory is transferred. *Id.*

See CONSTITUTIONAL LAW (2, 3); DRAINS (1).

TRESPASS — See ADVERSE POSSESSION (2); INJUNCTION (4); PLEADING (1, 4).

TRIAL.

1. An instruction that an alibi, when established, furnishes the best of defenses, because a man cannot be in two places at one and the same time, but the jury should examine such evidence carefully in determining its truth or falsity, *held*, when read with the entire charge, not to improperly suggest a doubt of the credibility of defendant's witnesses. *Harris* v. *Neal*, 57.

2. An instruction in which the court states his recollection that certain incompetent testimony was not received, and that counsel was in error in referring to it, and that the jury will not take it into consideration, does not cure the error in receiving the testimony. *Hyman* v. *Kirt*, 114.

3. Reference by counsel to a party in argument as a "Jew horse dealer" is reprehensible, and in a proper case may cause reversal. *Id.*

4. An instruction stating that plaintiffs had testified to a certain matter is properly refused where the most that could be said is that plaintiffs had testified to certain admissions on the part of defendants from which such an inference could be drawn. *G. S. Blakeslee & Co.* v. *Reinhold Manfg. Co.*, 230.

5. Where the testimony of the principal witness, on direct examination, supported plaintiffs' theory that defendant bank discounted a note belonging to plaintiffs on an unauthorized indorsement of plaintiffs' agent, who absconded, and on cross-examination gave inconsistent testimony tending to support defendant's theory that it loaned money to witness, who paid it to the agent, there was a question for the jury as to which portion of the witness' testimony they would believe, which should have been submitted to them, notwithstanding a motion by both parties for a directed verdict. *Lonier* v. *Ann Arbor Savings Bank*, 253.

6. An assignment that the court erred in not instructing the jury that there could be no recovery under items 3 and 5 of the bill of particulars is not supported where it appears that the court instructed as to what items in the bill they might consider, and items 3 and 5 were not among them, and the court said in a discussion in the jury's presence that such items were not to be considered. *Mott* v. *Penoyar*, 274.

7. No error appears from the refusal of instructions which, so far as competent, are covered by the general charge. *Buxton* v. *Ainsworth*, 316.

8. An instruction in a personal injury case stating that plaintiff might recover for pain, suffering, and mortification experi-

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TRIAL—Continued.

enced, and, in case the injury was permanent, that to be experienced, "also such further damages as will compensate plaintiff for his loss of capacity and prospects of life," *held*, not objectionable as permitting recovery for loss of earning capacity not proved, where the jury were elsewhere instructed that there could be no recovery for time lost or for diminished earning capacity, more especially as the amount of the verdict did not indicate misapprehension as to the elements of recovery. *Id.* 317.

9. An excerpt from the charge should not be isolated from what preceded and followed it for the purpose of finding error. *Croze* v. *St. Mary's Canal Mineral Land Co.*, 364.

10. In an action for breach of promise to marry, statements by plaintiff's counsel, in argument, wholly unsupported by the record, amounting to insinuations that defendant had used money to induce his witnesses to testify in his behalf, and that improper methods had been taken by a detective, are so prejudicial as to necessitate a reversal of the judgment. *Reed* v. *Louden*, 521.

11. A modification of a requested instruction, to the effect that the question presented by the instruction is an academic one, in view of the issues and evidence, is not prejudicial error, where the record warrants the charge as given, and the claims of the parties are clearly stated in other portions of the charge. *Anderson Carriage Co.* v. *Pungs*, 580.

12. An assignment of error to a segregated portion of a charge will not be sustained on the ground that the agreement described therein did not constitute the agreement declared upon, where it is apparent from a reading of the entire paragraph that the court referred to the agreement relied upon. *Id.* 581.

13. The practice of allowing counsel themselves to read to the jury such of their requests to charge as have been approved by the court, instead of the trial judge himself reading them or making them a part of his general charge, though not approved, furnishes no ground for reversal in a case in which counsel did not object nor except to it. *O'Dell* v. *Goff*, 644.

14. The court may in its discretion refuse requests to charge which emphasize the importance of the testimony of a particular witness. *Id.* 645.

15. Where, on review of proceedings to establish a drain, it appears that the jury who found that the drain was a necessity and assessed the damages, while considering their verdict and looking over the lands to be taken, "accepted entertainment of, and were repeatedly treated to cigars by, certain of the petitioners for the drain and who were interested in its construction," and while the jury were taking their dinner at one of the petitioners, a lady who was waiting on them said: "The way to a man's heart is through his stomach," and inquired whether they would want stagnant water near their homes, the proceedings must be quashed. *Harrington* v. *Calhoun Probate Judge*, 660.

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TRIAL—Continued.

16. Where the irregularities occurred on June 11th, the verdict was filed on the 18th, and the objections were made on the 14th, a waiver of the objections could not be inferred from failure to seasonably object, where relator's counsel did nothing to indicate his approval or his intent to waive objections, and merely maintained silence. *Id.*

17. It is improper for counsel to make statements of fact not in evidence during the examination of witnesses; for if counsel possesses any information relative to the facts, which he thinks should go to the jury, he should be sworn as a witness and subject himself to the rules governing the taking of testimony. *Clark* v. *Ulrich*, 695.

18. Defendant treasurer, having testified that he thought he had paid a certain order through the bank, the cashier of the bank was properly called on rebuttal to show what arrangement had been made whereby money was placed by the treasurer in the bank, and orders drawn on account, and whether the order in question had been so paid. *Township of Alpena* v. *Mainville*, 732.

See ACTION (2); CRIMINAL LAW (6); JURY; MUNICIPAL CORPORATIONS (8).

TROVER AND CONVERSION—See PLEADING (6).

TRUSTS.

1. Under section 8885, 3 Comp. Laws, no relief can be granted a husband against his wife with respect to property which he bought with his own funds, taking deeds therefor naming her as grantee. *Wipfler* v. *Wipfler*, 18.

2. Where an executor and trustee under a will without right used the principal of one trust fund to preserve real estate constituting another trust fund, by paying the interest on mortgages thereon, he will, for the purpose of an accounting, be charged with such principal; but he will have a lien upon the other fund for reimbursement out of any surplus which may remain after payment of the mortgages thereon. *Draper* v. *Brown*, 122.

3. Where testator devised the entire estate in certain lands to his executors and his grandson, the executors taking no beneficial interest, but merely an estate in trust for the beneficiary, and the beneficiary died before the happening of the contingency upon which he was to receive the legal title, the purpose of the trust ceased, and under section 8851, 3 Comp. Laws, the estate of the trustee ceased, and the estate descended to the beneficiary's heirs. *Taylor* v. *Richards*, 667.

VARIANCE—See FRAUD (5).

VENDOR AND PURCHASER—See FRAUD (1).

VENUE—See CRIMINAL LAW (8-10); MANDAMUS (1).

VERDICT—See NEW TRIAL (1).

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VESTED ESTATES—See FRAUDS, STATUTE OF (1); WILLS (3, 8).

VESTED RIGHTS—See TOWNSHIPS (3).

VIEW—See MUNICIPAL CORPORATIONS (8).

WARRANTY—See SALES (4).

WATERS AND WATERCOURSES.

1. The owner of iands abutting on a watercourse owns to the middle of the stream. *Hartz* v. *Detroit, etc., Ry.*, 337.

2. Where the title of the owner of lands abutting on an artificial mill pond, formed by damming the stream, is derived from deeds describing his land as running "along the bank of said mill pond" and as running "along the edge of said mill pond," he owns to the middle of the thread of the stream, including the right to the water front, and the use of the water in the stream in its natural state, in case the pond should be discontinued. *Id.*

See FRAUD (1).

WATERWORKS—See MUNICIPAL CORPORATIONS (13, 14).

WILLS.

1. The superior court of Grand Rapids, in chancery, has jurisdiction to determine the ownership of a homestead, the issue being whether an unrecorded deed to decedent from her husband was ever delivered, to construe her will, and to instruct and direct the trustee thereunder with respect to the trust estate. *Draper* v. *Brown*, 121.

2. Where testator devised all his real and personal property to his wife "to be hers absolutely during her lifetime, and at her death what of the same might be left to" his two sons and their heirs, and his widow became sole executrix, she had absolute and unlimited power to dispose of shares of stock belonging to the estate and pledged to secure an indebtedness; and the sons, though they executed a bill of sale purporting to transfer their interest, had no interest in the stock upon which to found a bill to cancel the sale on the ground of fraud practiced upon them by the purchaser. *Turnbull* v. *Johnson*, 228.

3. A will leaving all testator's property to his widow for life, with power to make such arrangements with the children as to having their shares before her death as she might deem best, and to his four named children, subject to the life interest, to be divided among them after her death share and share alike, creates vested estates in remainder in common upon testator's death in favor of the four children. *Broas* v. *Broas*, 310.

4. In proceedings to probate a will, contested on the ground that testator's belief in the illegitimacy of his son was an insane delusion, evidence examined, and *held*, that there was evidence from which the jury might infer that his belief was not reached by weighing testimony, but was merely the offspring of his monomania upon the subject of spiritualism.

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WILLS—Continued.

and that the question whether testator's belief was an insane delusion was, therefore, a proper one for the jury. *O'Dell* v. *Goff*, 643.

5. In proceedings to probate a will, contested on the ground that testator's belief in the illegitimacy of his son was an insane delusion, the chastity of testator's wife, contestant's mother, was in issue, and evidence of her chaste reputation was admissible. *Id.*

6. Where, in a will contest, in which one of the issues was whether testator was a monomaniac upon the subject of spiritualism, contestant introduced testimony tending to prove that testator entertained the belief that a departed spirit brought and gave to him a crisp new $5 bill, permission to an expert offered by proponents to explain the circumstance, on the theory that the belief of testator was rational from the standpoint of a spiritualist, was properly denied, where it appeared that the proffered explanation would only have brought into the case a theory of spiritualism which, if believed by the jury, would have justified their discrediting contestant's witnesses who had sworn that testator entertained such belief, that not being a proper test of the credit of the witnesses. *Id.* 644.

7. On the trial of a will contest, an instruction that "No declarations or statements made by testator before or after he made his will can be considered by you as any proof of undue influence, or that he was unduly influenced in making his will," was properly refused, since, though the declarations furnished no evidence that others exerted an undue influence, they might afford evidence of the effect of said influence upon his will. *Id.* 645.

8. In determining whether an estate created by a will is vested or contingent, the authorities chiefly agree in favoring the vesting of interests and in treating future interests as vested where there is any present interest in the income of the property. *Taylor* v. *Richards*, 667.

9. Where testator devised land to his grandson upon his reaching the age of 25 years, the control of the same to remain in the hands of the executors until that time, the income to be used for his support and education, and the land or its proceeds to be conveyed to him upon his reaching the prescribed age, if he should show himself worthy and of steady habits, the entire estate, under section 9263, 3 Comp. Laws, passed to the devisees, and, the executors having no beneficial interest, the entire beneficial interest passed to the grandson, the contingency applying merely to the time when he should come into full enjoyment of the estate. *Id.*

10. In a proceeding to probate a will, contested on the grounds of mental incapacity and undue influence, evidence examined, and *held*, to be insufficient to take the questions to the jury, and that the court should have directed a verdict for proponents. *Clark* v. *Ulrich*, 695.

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WITNESSES.

1. On a bill by the sole heir and legatee of a testatrix against her surviving husband to restore a deed, admitted by him to have been executed in her favor, but never delivered, he is not prohibited by the statute from testifying that after executing the deed he kept it in his safe at his place of business, and that his wife never saw it unless at the time of its destruction, although she was told by him that the deed was in existence and where to find it. *Draper* v. *Brown*, 120.

2. Upon summary proceedings by the trustee of an estate, against a tenant holding under a written lease made by plaintiff's decedent, defendant cannot testify to a verbal modification of the lease made by decedent and himself. *Goebel* v. *Look*, 204.

3. In an action for damages for a personal injury, defendant's father, who was a witness for defendant, was properly asked, on cross-examination, as showing his interest in the litigation, whether he did not claim to own everything defendant had, whether he knew anything about defendant having deeded all his land to him, and whether, although he had replevined all the personal property in the possession of defendant and levied upon under the execution for costs in the original case, he had given such property in for taxation. *Buxton* v. *Ainsworth*, 316.

4. Statements made by respondent at a conference between respondent, his attorney, and others were not confidential, and hence not privileged, and the attorney may testify thereto. *People* v. *Andre*, 582.

5. Defendant treasurer being sworn as a witness, it was proper, on cross-examination, as affecting his credibility, to show that in many instances, while he was treasurer, he had collected taxes and given receipts therefor, but had not marked such taxes as paid on the tax-roll, and they were returned as delinquent. *Township of Alpena* v. *Mainville*, 732.

See EVIDENCE (3, 9, 14); SAVING QUESTIONS FOR REVIEW (2); WILLS (6).

WORK AND LABOR.

1. Statements by a father and mother, that their son, who was living with them and working on their farm, should have the farm at their death, constitute no evidence of an agreement that he should have the farm in payment for his services, neither do they afford evidence of a binding promise, being consistent with the thought that it was the purpose of the father and mother to give a gratuitous preference to their son at their decease. *In re Colburn's Estate*, 206.

2. The relation of father and son prevents the implication of any agreement that the son should receive compensation for services rendered upon the father's farm while a member of his household. *Id.* 207.

3. Where it was agreed between father and son that if the son would work on the father's farm until the death of his parents he should have the farm, but the son died before his par-

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WORK AND LABOR—Continued.

ents, it cannot be implied that the father agreed to pay what the son's services were reasonably worth. *Id.*

4. In an action against a corporation for the value of services performed during a certain period, the fact that plaintiff was employed by another corporation during the same period and received an annual salary therefor, will not prevent his recovery, where his employer is not objecting and he testifies that he performed all the services required of him by his employer, and that the general manager authorized his employment by defendant, though the principal stockholder of both companies claims that the original contract of employment was that plaintiff "was to do anything either for me or the company or the W. company that I might ask him, without other compensation." *Ruttle* v. *What Cheer Coal Mining Co.*, 800.

5. Where, in an action against a corporation for the reasonable value of services performed as superintendent, it appears that plaintiff was also employed and received an annual salary from another corporation, and has brought suit against the principal stockholder of both corporations for still other services, the character and extent of the services rendered to the other two employers is a material inquiry, and a very wide latitude on cross-examination is permissible. *Id.* 801.

6. In an action against a corporation for the reasonable value of services performed, evidence as to the price at which plaintiff resold to defendant's principal stockholder certain stock in another corporation, that he received no benefit from its increase in value while he held it, and the price at which a third person transferred the stock to the principal stockholder, is immaterial, and its admission prejudicial. *Id.*

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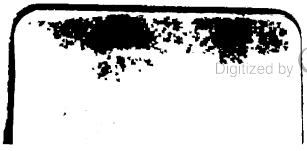
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